166-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 747.

WILLIAM H. MOSES ET AL., ADMINISTRATORS OF THE ESTATE OF WILLIAM B. MOSES, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

First. That heretofore, to wit, on the 10th day of December, 1894, the argument of this cause was concluded before the Chief Justice and seven Associate Justices, Mr. Justice Jackson being absent, and the said cause was then submitted to the court.

Second. That thereafter, to wit, on the 17th day of the same month, the Chief Justice announced that the judgment of the Court of Appeals for the District of Columbia in said cause was affirmed by a divided court.

Third. That the principal questions involved in said cause were (1) whether the instrument sued upon was the

bond of Willlam B. Moses, deceased, of whose estate the plaintiffs in error are administrators; (2) whether the duties of the principal obligor in said alleged bond were sufficiently defined by law and the regulations of the War Department, or were sufficiently shown by the evidence in the case to render the said writing a valid and binding contract; and (3) whether the settlement made by the Government with the principal in said alleged bond did not release the surety from the obligation, if any, which he may have assumed by becoming party thereto; (4) whether the Treasury transcript of the restatement of Howgate's accounts was admissible in evidence; and (5) whether the record of a judgment rendered against Howgate by default was admissible in evidence.

That this cause was advanced for hearing upon the petition of the defendant in error by an order made during the present term of this court, while, if the said cause had stood for hearing until the same had been reached upon the regular call of the docket of this court, the same might have been heard by a full bench, and the result of such hearing might have been the reversal of the judgment of the court below instead of the affirmance of it as has now been announced.

Your petitioners are informed and believe that the questions involved in this suit are not only of great importance to the plaintiffs in error but involve questions of law of great practical importance to the Government of the United States as well as individuals, and your petitioners are advised that a single judgment upon said questions is not necessarily final, and the affirmance of the judgment of the Court of Appeals by a divided court necessarily invites further litigation in respect to the several questions of law at issue in this case:

Wherefore, by reason of the premises, your petitioners pray that a rehearing be granted in said cause and that it be provided in the order granting said rehearing, if it shall

please this honorable court to grant such order, that the rehearing be had before a full bench.

WILLIAM H. MOSES,
HARRY C. MOSES,
ARTHUR C. MOSES,
Plaintiffs in Error.

CERTIFICATE OF COUNSEL.

The undersigned counsel for plaintiffs in error, believing that the ends of justice would be served by a rehearing of this cause before a full bench, and believing also that the facts stated in the petition constitute good grounds for a rehearing of this cause, so certify, in support of the petition, as required by Rule 30 of this court.

WM. F. MATTINGLY,
W. L. COLE,
Counsel for Plaintiffs in error.

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Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

166-571

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM H. MOSES, HARRY C. MOSES, and Arthur C. Moses, administrators of William B. Moses, deceased, plaintiffs in error,

vs.

THE UNITED STATES.

No. 747.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM H. MOSES, HARRY C. MOSES, and Arthur C. Moses, administrators of William B. Moses, deceased, plaintiffs in error,
vs.
THE UNITED STATES.
No. 747.

MOTION TO ADVANCE.

This is a suit against a surety on a bond given by Henry W. Howgate, a defaulting officer of the Signal Service of the United States, with Lebbeus H. Rogers, of New York, and William B. Moses, of Washington, D. C., as sureties, for the sum of $12,000.

Suit was brought by the Government against the cosurety Rogers at New York and a judgment obtained, which, upon writ of error, was affirmed by this court (141 U. S., 548).

On February 1, 1892, however, the court entered an order directing that the mandate be not issued until further order.

In view of these circumstances the Solicitor-General respectfully moves the court to advance the case, to the end that the liability of both sureties may be settled and enforced as soon as possible.

Notice of this motion has been given to the counsel for the plaintiffs in error and proof of service filed with the clerk.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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JAMES H. McKENNEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 747.

WILLIAM H. MOSES ET AL., ADMINISTRATORS OF THE ESTATE OF WILLIAM B. MOSES, DECEASED,

PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

W. L. COLE,
WM. F. MATTINGLY,
Attorneys for Plaintiffs in Error.

Law Reporter Print.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 747.

WILLIAM H. MOSES ET AL., ADMINISTRATORS OF THE ESTATE OF WILLIAM B. MOSES, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Brief in Behalf of Plaintiffs in Error.

STATEMENT.

This action was brought in the Supreme Court of the District of Columbia on the 29th day of September, 1884, by the United States against Henry W. Howgate, Lebbeus H. Rogers and William B. Moses, but the two first named defendants were never served with process and never appeared. W. B. Moses was the sole defendant until his death, when the case was revived against his administrators, the present plaintiffs in error. The case was tried on the 28th day of March, 1893, after the death of W. B. Moses, and resulted in a verdict and judgment against plaintiffs in error, and upon their appeal to the Court of Appeals of the District of Columbia, the judgment was affirmed and they removed the case here by writ of error.

The instrument sued on purports to be the bond of Howgate, Rogers and W. B. Moses to the United States in the

penalty of twelve thousand dollars, subject to condition in the following language:

> "The condition of this obligation is such that whereas the above bounded First Lieut. Henry W. Howgate, 20th inf't'y, has been assigned to duty as a property and disbursing officer Signal Service, U. S. A.—has accepted said assignment:
>
> "Now, if the said 1st Lieut. Henry W. Howgate, 20th infantry, shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue."

Issues were joined upon pleas setting forth the following defenses:

First. That the alleged writing was not the bond of the said W. B. Moses.

Second. That the alleged bond was extorted from Howgate by the illegal exercise of military authority by his superior officers.

Third. That there was no such office as is mentioned in the condition of said bond created by law, and no duties appertaining to such office prescribed by law or any regulation or order of any department or officer and that the alleged bond was void for uncertainty.

Fourth. That the accounting officers of the Treasury, authorized by law to do so, settled the accounts of said Howgate as property and disbursing officer of the Signal Service, and issued to him a certificate of non-indebtedness to the United States, of which defendant had notice, which discharged him from liability as surety on the alleged bond.

Fifth. That the said Howgate had kept and performed the condition of said bond.

The alleged bond bears date March, 1878, but is blank as to the day of the month. It was signed by Rogers on the 13th and by Moses on the 14th of that month, but was not sealed by either of them or by Howgate and was delivered in that condition by Howgate to the proper authorities of the War Department on the 27th of the same month. The Secretary of War declined to accept the bond, for the reason that it did not bear the seals of the supposed obligors, and by his direction it was, after remaining in his custody and control two days, returned to Howgate for the purpose of having the seals affixed, and on the 1st day of April, 1878, the writing was returned to the office of the Secretary of War by Howgate with seals affixed, but no evidence was given tending to show the sealing of the instrument by Moses or Rogers. Upon this state of the evidence the defendants objected to the introduction of the alleged bond in evidence; first, because it varied in date from the bond described in the declaration; and, second, because there was no evidence tending to prove that Moses sealed the instrument and made it his bond, but the court admitted it in evidence and defendants excepted. At the close of the evidence the defendants asked the court to instruct the jury that unless they believed from the evidence that the said W. B. Moses sealed the instrument or authorized some one to do it for him they should find for the defendants; but the court refused to so instruct and the defendants excepted.

After the close of the evidence for the Government, the defendants offered evidence tending to prove that the alleged bond was extorted from Howgate by the illegal use of military authority by his superior officers, and at the instance of plaintiff's attorney the court rejected the evidence and defendants excepted. After the close of the evidence, there being evidence before the jury tending to show that the bond had been illegally extorted from Howgate, the defendants' attorney prayed the court to instruct the

jury that if they believed from the evidence that it was so extorted they should find for the defendants. But the court refused to so instruct and the defendants excepted.

The evidence failed to show any regulation or order of the War Department, or any officer thereof, prescribing any duties for the officer detailed as "property and disbursing officer, Signal Service U. S. A.," and there being no law creating any such office or prescribing duties thereof, the defendants' attorneys asked the court to instruct the jury that they should find for the defendants. But the court refused to so instruct and the defendants excepted. The defendants' attorneys then prayed the court to instruct the jury that it was incumbent upon the plaintiff to prove that the money charged against Howgate came to his hands in virtue of his office of property and disbursing officer of the Signal Service, and that it was his duty to receive and disburse it, and if the plaintiff had failed to so prove then they should find for the defendants; but the court refused to so instruct and the defendants excepted.

Howgate was assigned to duty as "property and disbursing officer" July 25th, 1876. He was not required to give bond until March, 1878, and then only in a penalty of $12,000, "*similar in amount and form to that given by a captain of the Commissary Department*" as stated in the order of the Secretary of War requiring the bond. According to the evidence in behalf of the Government, between the date of the bond and September, 1880, Howgate is charged with having received the very large sum of $1,182,742.32. He rendered regular accounts with vouchers periodically as required by law and the regulations of the Treasury Department and his accounts were regularly settled and balanced by the proper accounting officers of the said Department from time to time during the period aforesaid, and December 18th, 1880, he resigned his commission in the Army, which was accepted, and certificates of the officers of the Treasury whose duty it is by law to give them, were issued

to him that his accounts had been finally settled and closed on the books of the Treasury, and that he was not indebted to the Government on any account whatever, and he was paid the balance of salary due him as an officer of the Army, which facts were presumably known to his sureties. On the 24th of August, 1881, the Government brought a suit in assumpsit against Howgate in the Supreme Court of the District of Columbia and sued out an attachment on the ground that he had left the District with intent to defraud his creditors, and attached all his property in the District, claiming to recover the sum of $101,257.08, and on the 24th day of May, 1883, judgment by default was entered against him for the above amount, in satisfaction of which all his property in the District was sold. On the 29th day of September, 1884, four years after Howgate had ceased to be "property and disbursing officer," and his accounts as such settled and balanced with the knowledge of his sureties; more than three years after the Government had brought suit against Howgate and attached all his property, and more than a year after it had obtained judgment against him, and while the books of the Treasury Department showed that Howgate did not owe the Government anything, this suit was brought against Moses on the supposed bond. He had been informed by the settlement of Howgate's accounts by the Treasury in 1880, that the Government claimed no indebtedness against Howgate or liability upon the bond. He never was notified to the contrary until the institution of this suit. There had been in the meantime no change, or attempt to change the settlement of Howgate's accounts at the Treasury Department. On the 1st day of October, 1884, the Secretary of War addressed a letter to the Second Comptroller of the Treasury, in which he said he transmitted a statement of Howgate's accounts as "property and disbursing officer," prepaid by the acting chief signal officer showing in detail the vouchers and checks which are known or believed to be fraudulent, with names of the witnesses, etc., and also

stated in the said letter that "the paper was forwarded to you with a view to a restatement of the accounts of said Howgate for use in the suit on his bond of April 2, 1878." And thereupon the accounting officer of the Treasury partially restated the accounts of Howgate by disallowing the vouchers supposed to be fraudulent. This was done without notice to Howgate or his sureties, and without any evidence. The accounting officers were governed by the statement of the chief signal officer transmitted in the letter of the Secretary of War, and obtained a result showing Howgate indebted to the Government in the sum of $133,255.22. This restatement was embodied in a Treasury transcript and offered by plaintiffs as evidence of Howgate's indebtedness in the suit against one of his sureties.

The defendant objected to it as incompetent evidence, but the court admitted it and they excepted.

The plaintiffs' counsel also offered in evidence the record of the judgment against Howgate above mentioned, to which the defendants objected as incompetent; but it was admitted and they excepted.

The plaintiffs' counsel also offered in evidence verbal evidence tending to prove that some of the vouchers referred to in the above-mentioned letter of the Secretary of War, and in the Treasury transcript (the amount of which made up the above balance), were forged and fraudulent; but the defendants objected to this evidence as incompetent and inadmissible under the pleadings; but it was admitted and they excepted.

The defendant's counsel also, on the whole evidence, prayed the court to instruct the jury that if they believed from the evidence that Howgate's accounts were regularly stated and settled by the accounting officers of the Treasury and he given a certificate of non-indebtedness, and that these were recorded in the books and proceedings of the Treasury Department, the plaintiffs were thereby estopped from maintaining this action; but the court refused to give such instruction and the defendants excepted.

Assignment of Errors.

The court erred—

In admitting the alleged bond in evidence, there being a material variance in date between the instrument offered and the one described in the declaration.

In admitting the alleged bond in evidence when there was no evidence tending to prove that it was sealed by W. B. Moses.

In refusing to instruct the jury that they should find for the defendants unless they believed that the alleged bond was sealed by W. B. Moses or by some one by him authorized to do so.

In rejecting the evidence offered in behalf of the defendants tending to show that the alleged bond was extorted from Howgate.

In refusing to instruct the jury to find for the defendants if they believed from the evidence that the alleged bond was extorted from Howgate.

In refusing to instruct the jury to find for the defendants on the ground that there is no law creating the office mentioned in the condition of the alleged bond, and that the evidence failed to show that any duties had been attached to or prescribed for such office or officer by the order of the War Department or any officer thereof.

In refusing to instruct the jury that it was incumbent upon the plaintiffs to prove that the money charged against Howgate came to his hands in virtue of his office of property and disbursing officer of the Signal Service, and that it was his duty to receive and disburse it, and if they had failed to so prove that the verdict should be for the defendants.

In admitting the said Treasury transcript in evidence.

In admitting the record of the judgment against Howgate in evidence.

In admitting the oral evidence tending to prove that the said vouchers were forged and fraudulent.

In refusing to instruct the jury that if they believed from the evidence that Howgate's acccounts were regularly stated and settled by the accounting officers of the Treasury, and he given a certificate of non-indebtedness, and that these facts were made matter of record in the Treasury Department, the plaintiffs were estopped thereby from maintaining this action.

Variance as to Date of Bond.

The variance between the date of the bond alleged in the declaration and the date of the instrument offered in evidence is fatal. The declaration (1) alleges that the bond bore date the 2d day of April, 1878. The instrument produced and admitted in evidence bore date March, 1878, the day being blank. This is a fatal variance, and the court should have rejected the offered evidence.

Cook *vs.* Graham, 3 Cranch, 235.

It is attempted by the defendants in error to avoid this point by contending that the objection to this variance came too late; that when the alleged bond was originally offered its admission in evidence was objected to only upon the ground that the evidence failed to show that it was a sealed instrument (26) and that the objection of variance came later by motion to strike out the bond (101–2). But the reply to this is that at the time the instrument was offered it was admissible, being accurately described in the second count of the declaration (6), which was subsequently abandoned by the defendants in error by leave of the court (101), which action on their part was immediately followed by the motion to strike out the alleged bond on the ground of variance (101–2).

The cases in this court relied upon by counsel for defend-

ants in error, that the variance is not fatal, do not support that contention, but the contrary. In the case of the United States *vs.* Le Baron, 4 Wall., cited by them, the court says, at page 648:

> "But it is also a rule of evidence that when words used in a declaration are *descriptive* of the instrument declared on, it must, when offered in evidence, conform strictly to that description; and we concede that if it is alleged as part of the description of such an instrument, *that it bears such a date, or is dated of such a day, that no instrument will be admissible which does not bear that date.*"

It was held that there was no variance in that case because the instrument was so declared on as not to make the date of the bond descriptive of it. The declaration in that case was "That on July 1st, 1850, the defendant by his certain writing obligatory, acknowledged himself indebted, &c." Of this the court says on the same page: "This manner of declaring gives no date to the bond, and merely gives the time when defendant became bound by it to the plaintiff." But the declaration in the present case gives a date to the bond by declaring that "on the second day of April in the year of our Lord one thousand eight hundred and seventy-eight, by their certain writing obligatory *of that date*, sealed with their seals, &c., acknowledged themselves to be indebted to the plaintff," &c. (1).

The defendants also raised this question of variance by asking the court to instruct the jury that the variance is fatal and that no recovery could be had (106–7).

The writing admitted in evidence is not the bond of W. B. Moses, never having been sealed by him. There is no evidence tending to show that it was sealed by him or by his authority.

The alleged bond is found on page 24 of the Record. Before offering it in evidence the plaintiff introduced correspondence between the War Department and Howgate in relation to it (20-21). The affidavit of Moses to his responsibility is dated March 14, 1878. That is probably the day on which he signed it, and the attesting witness introduced by plaintiff gives that as the date according to his recollection (23). The letter of Howgate transmitted the bond, the respective endorsements thereon of the Chief Clerk of the War Department and the Judge Advocate General introduced by plaintiff (20–21), show that the bond was received at the department on the 27th day of March, 1878, signed by Howgate and his sureties, *but not sealed by any of them*, and that on the 29th day of that month, by the order of the Secretary of War, the instrument was returned to "Howgate to have proper seals affixed" (21), and that on the 1st day of April, 1878, it was returned by Howgate to the department "with seals affixed, as per instruction" (21).

It is true that the subscribing witness says he thinks Moses sealed it when he signed it, but is not positive, but the correspondence shows positively that he did not, and Crosby, then Chief Clerk of the War Department, who carried on the correspondence with Howgate in reference to the bond, and who received it, returned it, received it again and approved it, says there were no seals when it first came to his hands. When it left the hands of Moses and when it went into the control of the Government it was not the bond of Moses. There is no evidence tending to show that the paper ever afterwards was seen or sealed by him.

The sealing of a bond is as necessary to its due and

formal execution as signing, and there being no evidence tending to prove the sealing of the bond, the defendant's objection to its admission in evidence (Rec., p. 26) should have been sustained.

Follett *vs.* Rose, 3 McLean, 332.
U. S. *vs.* Linn, 15 Peters. 290; S. C., 1 How., 104.
Edlin *vs.* Sanders, 8 Md., 129, 130.
State *vs.* Humbird, 54 Md., 327.
Chilton *vs.* People, 66 Ill., 501.
Barnett *vs.* Abbatt, 53 Vt., 120.

In the case of U. S. *vs.* Linn, 15 Peters, it was decided that an instrument reciting in the body of it that it was under the hands and seals of the persons executing it, but bearing upon its face no scrolls or seals, was not a bond, and in the same case, reported in 1 How., it was decided that where there is anything on the face of the instrument when it comes to the hands of the Government to put the officer accepting it upon inquiry, the burden is upon the Government to explain the alteration, if any was made after it left the hands of the surety.

In the case of State *vs.* Humbird there was no seal opposite the name of Humbird, one of the sureties, but there was one opposite the name of each of the other obligors.

Non est factum was pleaded and Humbird sworn as a witness for plaintiff, and testified that when he signed his name there he supposed he was signing as one of the sureties for the principal obligor.

Judgment for defendant on plea and evidence.

ROBINSON, J.:

> "In order, therefore, to support this action it must appear that the bond in question was sealed by the appellee, Humbird, or by some one acting in his behalf and by his authority, or that he adopted the seal of one of the other contracting parties."

It was proved at the trial in the Humbird case that Sprigg, the principal obligor, subsequently to the execution and delivery of the bond, indemnified him and one of the other sureties, and it was argued that the case should have been submitted to the jury to draw the inference from this, that Humbird had executed and delivered the instrument as his bond. In response to this point the court says:

> "The question here, however, is whether the bond sued on is in fact the bond of Humbird. He intended, no doubt, to affix a seal to his signature, and the Sprigg conveyance may be evidence to show that he was under the impression that such seal had been affixed, but neither his intention nor impression could make an instrument a deed when in point of fact it was not a deed."

To the same effect is Chilton *vs.* People, 66 Ill., 501.

In the case of *Barnet vs. Abbatt, supra*, the sureties signed the writing but did not seal it, and delivered it in that condition to the principal, who added the seals *before* delivering it. The instrument recited that it was "sealed with our seals," and the sureties testified that when they signed it they understood it to be a bond to secure the due performance of Abbatt's duties as treasurer. Speaking of this state of facts the Supreme Court of Vermont said:

> "The seal converts a simple contract into a specialty, and makes it one of different grade and character. And it is as much forgery to convert a simple contract into a specialty without authority as it is to affix the signatures which create the contract."

The cases in this court relied upon by the defendants in error to the point that the plaintiffs in error are estopped from showing that the instrument was not sealed by their decedent do not apply. The case mainly relied upon is *Dair vs. U. S., 16 Wall., 1.* In that case it was held that sureties by signing a bond *complete upon its face*, and delivering

it to their principal to be delivered to the Government, and upon condition that another designated person should also sign as surety, were estopped from pleading that the bond was delivered without the signature of such other person in violation of that condition, as the officer who acted for the Government in accepting the bond had no notice of it. Speaking of this want of notice, the court says, page 4:

> "There was nothing on the face of the paper or in the transaction itself to put the officer on inquiry."

Distinguishing between that case and others referred to in argument, the court says, page 5:

> "The case of Paulding et al. *vs.* The United States has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. If the name of Joseph Claud (the name of the additional surety in the Dair case) appeared as the co-surety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the Government, who would have been put on inquiry to ascertain why Claud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things.
>
> "In any case, if the bond is so written that it appears that several were expected to sign it, the obligor takes it with notice that the obligers who do do sign it can set up in defense the want of execution by the others, if they agreed to become bound only on condition that the other co-sureties joined in the execution."

To liken the Dair case to the one under discussion, suppose the name of Claud had appeared in the body of the bond in that case as one of the obligors, and the agent of the Government had thereupon delivered it to the principal

to have Claud sign it, and instead of obtaining the signature of Claud had signed the latter's name to it himself: would that have bound the other sureties?

Speaking upon the question of estoppel, the court in the case above cited in 53 Vermont, said:

> "The plaintiff's counsel are right in their law, that if the sureties induced the selectmen to receive and treat this paper as a sealed instrument, and rely upon it as such, they are estopped now from calling it in question. But there were no *facts* stated in the report that would estop the sureties from insisting that their liability is to be measured and determined by the instrument *as they made it.* It is said they should be held liable, because they put it in the power of Abbatt to deliver it to the selectmen as a bond duly executed and sealed. It was alike in the power of Abbatt to change the tenor of the instrument, and add new stipulations, and increase the liability of the signers. Whether Abbatt had done this, or changed the character of the instrument, by affixing seals without their authority, the signers who did not consent to the alterations have no liability under it; it becomes entirely vitiated as theirs."

It is contended in behalf of the defendants in error that the proof of the signing raises a presumption of sealing. This would be so if the evidence of the defendants in error did not rebut this presumption. But it does by showing positively that it was not sealed at the time it was signed. There being no evidence tending to show that it was presented to or sealed by Moses or by his authority after it was returned by the Secretary of War to Howgate, there is no evidence tending to show that it was sealed by Moses.

Again, it is said in behalf of defendants in error that when the bond was returned to the War Department with the seals affixed the presumption is that the sealing was the act of Moses. But from what facts does such presumption arise? Not from the act of signing, because that is con-

clusively rebutted, and there are no other facts connecting Moses with the instrument. On the contrary Moses, by his plea No. 2, denies under oath the sealing by him or by his authority. This denial can not be overcome by presumption, unless some facts were proved from which the presumption would naturally arise. It is said that it is presumptive that he intended to seal it, because the word "seal" is used in the body of the instrument, and that it is to be presumed that when it was returned to Howgate for seals that he was authorized to seal it. But there can be no presumption upon a presumption. Presumptions arise, if at all, from facts proved and not from other presumptions.

It is also worthy of notice that the defendants in error, after the filing of the plea denying the sealing, added a count to their declaration declaring upon the writing as an unsealed instrument (p. 5), which, however, they abandoned at the close of the evidence (p. 101).

The court erred in refusing to instruct the jury that sealing was necessary to a due execution of the bond.

If there was any evidence tending to show the fact of sealing, or from which the fact might be properly inferred, the sealing was a question of fact for the jury. And to meet this view of the case the plaintiffs in error requested the court to instruct the jury that sealing was an indispensable part of the execution of a bond, and that unless they believed from the evidence that the instrument was sealed by Moses or by some one authorized by him to do so they should find for the defendants.

See prayers 2 to 6, pages 107–8 of the Record, inclusive, where this instruction was asked in several forms, but each prayer was rejected. Also page 110, where an exception was taken to the ruling of the court on each prayer. It is true that the court submitted to the jury (pp. 111–12) the

question of whether the bond was executed by Moses. But it did not explain to the jury what constituted execution of a bond, in any language whatever, and the jury may well have inferred, and probably did so, from the action of the court in admitting the bond in opposition to the objection of the plaintiffs in error that Moses did not seal the bond—that sealing was unnecessary. The plaintiffs in error were entitled to have this principle in law explained to the jury, that they might have determined the question of the execution of the bond in the light of it, and the failure of the court to give the instructions asked by them upon this point, or to give any instruction upon this point, deprived them of a valuable right. In the case of Barnett *vs.* Abbatt, *supra*, the Supreme Court of Vermont, says that the fact that the bond contained the recitals "sealed with our seals," and the further fact that sureties testified that when they signed they understood they were signing a bond, was "evidence tending to show" that they sealed it, or authorized the principal to seal it for them, to be submitted to the triers of the fact—in that case a referee, in this case a jury. And in the Vermont case, notwithstanding the strong evidence (much stronger than in this case) tending to show that the sureties authorized their principal to seal the bond for them, the negative of the fact was found by the referee and approved by the court.

We contend that there was no evidence in this case tending to show either that Moses sealed the paper or authorized Howgate to do so. But even if we are wrong in this, the plaintiffs in error were entitled to have the jury determine the facts of sealing under proper instructions, which right was also denied them.

The alleged bond was extorted colore officii, and is void for that reason.

Howgate was a lieutenant of infantry, detailed to duty with the Signal Corps (Rec., pp. 15, 16 and 17), and was assigned by order of the chief signal officer to the duty as "property and disbursing officer." This assignment was made July 25, 1876 (Rec., p. 19). The Secretary of War seems to have been of opinion that he was not entitled to receive Government funds as a disbursing officer, but finally, on the 4th of March, 1878, directed that Howgate be required to give bond. (Rec., pp. 53 and 54.) This was after he had been acting as property and disbursing officer for more than eighteen months. The only law authorizing the Secretary of War to require a bond of any officer is Section 1191 of the Revised Statutes. And this authority was confined to officers of the quartermaster's subsistence and pay department, the chief medical purveyor and assistant medical purveyor, and storekeeper. Howgate came under neither of these designations, nor were the duties required of him, as now contended by the defendant's in error, similar to those appertaining to either of the offices above mentioned.

Their contention, according to their replication to the 7th plea (Rec., p. 4) is that Howgate was charged with disbursement of all money, and liable for all the property under the care, control, and administration of the Signal Corps. That the Secretary of War had no authority to require such a bond is clear. That Howgate gave the bond in obedience to the order of his superior officers is plain from the orders above referred to and his correspondence in relation thereto. (Rec., pp. 20, 53 and 54.)

The defendants offered to prove by Henry T. Crosby, who was the chief clerk of the War Department at the time the alleged bond was given, that when the bond was required of Howgate he objected to giving it, and only yielded his objection and gave it under a threat of military discipline by his superior officer, the Secretary of War;

but the court refused to admit the evidence and the defendants excepted. (Rec., pp. 64, 65, and 105.)

This was error. There was an issue of fact made on the point in the pleadings. (See plea No. 4, Rec., p. 2, and joinder of issue thereon, Rec., p. 3.)

This is not an immaterial issue, but a substantial one, and if sustained by proof renders the alleged bond void.

The evidence offered tended to sustain that issue and should have been admitted.

U. S. *vs.* Tingey, 5 Pet., 115.
Bradley *vs.* U. S., 10 Pet., 343.
U. S. *vs.* Linn, 15 Pet., 290.
U. S. *vs.* Humason, 6 Sawyer C. C. R., 199.
Howes *vs.* Marchant, 1 Curt. C. C. R., 140.
Churchill *vs.* Perkins, 5 Mass., 541.
U. S. *vs.* Hodson, 10 Wall., 409.
Soule *vs.* U. S., 100 U. S., 8.
Constable *vs.* Steamship Co., 154 U. S., 78.

In U. S. *vs.* Tingey, *supra*, the law required the officer to give a bond, but the one required of him contained a different and broader condition than the one prescribed by law. A plea alleging that the bond with the enlarged condition was required of him as a condition to his holding the office was demurred to and judgment given in favor of the defendants in the court below on the demurrer, and the Supreme Court sustained that judgment, saying:

> "It was plainly, then, an illegal bond, for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law."

This doctrine is recognized in the case cited in 10 and 15 Peters.

The cases in 10 Wallace and 100 U. S., while not adjudi-

cating the principle, both recognize such a defense, and therefore that such evidence is admissible.

In the recent case of *Constable vs. Steamship Co., supra*, the opinion in Tingey's case upon this point is quoted with approval and the principle applied.

In the case in 1 Curtis, Mr. Justice Curtis says:

> "The rule which avoids such bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding the citizen against oppression by the illegal exercise of official power. It is well stated by Sewall, J., Churchill *vs.* Perkins, 5 Mass., 541, that where the plaintiff demands the fruit of an obligation obtained *colore officii*, it must be shown that the demand is justified by some authority of the office, otherwise it is against sound policy and is void by the principles of the common law."

This rule should apply with greater force where the bond is exacted by the exercise of military authority.

In this connection attention is called to the fact that Howgate had held the position of property and disbursing officer of the Signal Corps for more than twenty months before this bond was demanded of him, having been assigned to that position on the 25th day of July, 1876, and he was required to give the bond in March, 1878. While it does not appear what property or money he had in his control during that period, the presumption is that he had some. Without any reason, therefore, shown in the record, and without any authority of law or regulation, he was required to give a bond. (See pp. 53 and 54 of the Record.) It there appears that the Secretary of War was searching for some statue under which he might require the bond, and, not having found any, he orders the chief signal officer, through his chief clerk, Crosby, the witness the defendants put on the stand and by whom they proposed to prove the coercion, to "cause" Howgate "to give bond." This was on the 18th of February, 1878, and on the 26th of March

following Howgate writes a letter to the Secretary of War showing that he had been molded into "compliance" with the orders of the officer. Certainly it is competent for the defendants to show, by the person who was used as the instrument to coerce that "compliance," how it was brought about, and that the bond was extorted *colore officii*.

Under this point the attention of the court is called to the instruction of the jury, prayed by defendant's counsel and refused by the court, being their prayer No. 8 (Rec., p. 108), to the effect that if the bond was coerced from Howgate there could be no recovery. It is submitted that there is some evidence in the record tending to support that issue on the part of the defendants, and that the instruction should have been given.

The defendants below were entitled to make this defense, and they were improperly prevented from doing so.

The Alleged Bond is Void for Uncertainty.

The third plea of the defendants (Rec., p. 3) is to the effect that there is no law creating any such office as that of "property and disbursing officer, Signal Service, U. S. A.," mentioned in said bond, or defining the duties of any such office or officer, and that said bond is void.

There is a special replication to the third plea (Rec., pp. 3 and 4), in which it is admitted that no such office, officer, or duties thereof had been created or defined by law prior to the execution of such bond, but alleges that the duties and responsibilities had been created and prescribed by order of the Secretary of War, and that such duties were in contemplation of the parties at the time of the execution of the bond.

It will also be observed that the original declaration is on the bond without mentioning the condition and assigning the breaches complained of. (Rec., p. 1.) The condition is set out in the defendants' third plea (Rec., p. 3), and the seventh plea (Rec., p. 3) is that the condition of the bond was

kept and performed by Howgate. The replication to the seventh plea (Rec., p. 4) assigns the breaches complained of and sets out the plaintiffs' real cause of action. The replication, to avoid the defect referred to in the third plea and replication, that there was no such office, officer, or duties created or prescribed by law, alleges that the same had been created by the orders and regulations of the Secretary of War, and that the duties thus prescribed for such officer were to have "charge of all matters pertaining to money and property under the care, control, and administration of the Signal Service of the United States Army."

As there is and was, confessedly, no law creating any such office or prescribing any duties appertaining thereto, it was incumbent upon the plaintiffs below, under the allegations of their said replications to the third and seventh pleas, to prove by orders or regulations made by the Secretary of War, or by his authority, that the office of property and disbursing officer of the Signal Service had been created, and that duties appertaining thereto as set forth in the said replications had been prescribed. *But no such facts were proved, and no evidence introduced tending to prove them.*

The Court of Appeals seems to have been misled as to the state of the proof upon this point, for in its opinion (Rec., p. 120) it is said:

> "As far back as the year 1867 the Signal Service had been organized, and this very office created by the War Department, with its appropriate duties; and in a clause in the Army Appropriation Act of June 16, 1874 (18 Stat., 72), Congress gave its express sanction to the organization, and provided that 'The Signal Service shall be maintained as now organized under the authority of the Secretary of War.'"

This is a mistake. There is not a word in the record tending to show when the Signal Service was organized, or how, or that the office mentioned was created by the authority of the War Department, or that any duties for such

office were ever prescribed by any authority. Nor does the Act of June 16, 1874, referred to, mention the office or refer to the duties All that is said in that act about the organization of the Signal Service is given in the quotation in the opinion of the Court of Appeals.

The only orders or regulations of the Secretary of War in relation to the Signal Service given in evidence are found on pages 13, 14, and 15 of the Record. There are two of them, one dated the 28th of February, 1870, and the other the 27th of June, 1872. Neither of them refers to a property and disbursing officer or prescribes any duties for such an officer, nor do either of the laws referred to in those orders. The Act of July 4, 1886, referred to in the order of June 27, 1872, grants the right of way over the public domain to all telegraph companies. and authorizes them to use material thereon found to aid in constructing their lines, provided the Government should have the use of said lines at rates to be fixed by the Postmaster General (14 Stat. at Large, 221). The appropriation bill of June 10, 1872, therein referred to, appropriates $250,000 to provide materials and to pay for telegraphing the weather reports under the authority and regulations of the Secretary of War, but that no part should be paid to any telegraph company which did not comply with the Act of July 24, 1866, by accepting rates fixed by the Postmaster General.

On pages 15 and 16 is found the request of General Myer that Howgate be detailed for duty with the Signal Corps. On page 17 is found the order, dated April 18, 1868, detailing him. On page 19 is the order of Captain Mallery, acting Signal Officer and assistant, assigning Howgate to duty as "property and disbursing officer," but there is no statement in the order what his duties are to be. In the same order Lieutenant Jackson is relieved from duty as property and disbursing officer, and directed to turn over to Howgate "all Government property and funds pertaining to this office for which he is responsible," but there is no hint as to what the property and funds were. Nor is

there any evidence to show how or why Captain Mallery had authority to make such an order. This order is dated July 25th, 1876, four years after the foregoing order of the Secretary of War, and nearly two years before Howgate was required to give bond. What Howgate did or what his duties were from July, 1876, to March, 1878, the record does not disclose.

Upon this state of the evidence the counsel for the defendants asked the court to instruct the jury as follows:

> "The plaintiff having introduced no evidence to prove what were the duties of a property and disbursing officer, Signal Service U. S. A., and there being no law defining the duties of such an officer, the plaintiff cannot recover in this action, and the verdict must be for the defendants." (Rec., p. 110, where several other instructions to the same general effect will be found.)

But the court refused to give such instruction and the defendants excepted, and thereupon prayed the court to instruct the jury as follows:

> "It is incumbent upon the plaintiff in this case to prove to the satisfaction of the jury that the money which came to the hands of Lieutenant Henry W. Howgate, and which the plaintiff claims he failed to pay over or account for, came into his hands as property and disbursing officer of the Signal Service, U. S. A., *and that it was his duty, as such officer, to receive and disburse such money;* and that he did, as such officer, receive such money and failed to pay it over and properly account therefor; and if the evidence fails to prove these facts to the satisfaction of the jury their verdict must be for the defendants." (Rec., p. 110.)

But the court refused and modified the instruction by striking out the requirement that it was incumbent upon the plaintiff to prove that it was the duty of Howgate as property and disbursing officer to receive and disburse the moneys with which the Government charged him, and the defendants excepted.

The court also on its own motion instructed the jury substantially that there were but two points for them to consider: First, whether Moses executed the bond; and, second, whether Howgate was indebted more than $12,000 to the Government when this action was brought; and to this the defendant excepted. (Rec., pp. 111–12–13.)

It is submitted that the failure to instruct as prayed and the instruction as given constitute error. It relieved the plaintiffs from proving one of the most material allegations of their replication assigning breaches, to wit, that the duties of property and disbursing officer had been prescribed by the War Department to be to have "charge of all matters pertaining to money and property under the care, control, and administration of the Signal Service of the United States Army," and that the receipt and disbursement of the moneys which it is claimed came to Howgate's hand were actually comprehended by the condition of the bond and were in contemplation of the parties at the time of its execution.

Where there is no law or lawful regulation of a department creating an office and prescribing the duties thereof, a bond to perform the duties of such supposed office and to account for and to pay over money coming to the hands of the officer is void for uncertainty, there being no definite subject-matter to which the obligation of the bond can attach.

United States *vs.* Tingey, 5 Pet., 115.
United States *vs.* Jackson, 104 U. S., 41.
United States *vs.* Maurice *et al.*, 2 Brock., 103.
Jackson *vs.* Simonton, 4 Cranch C. C. R., 259.
Com. *vs.* Jackson, 1 Leigh, 485.
City of Lafayette *vs.* James, 92 Ind., 240.
Same Case, 47 Am. Rep., 140.
Manufacturers' National Bank *vs.* Dickerson, 41 N J. (Law), 448.
Same Case, 32 Am. Rep., 237.
Pybus *vs.* Gibbs, 6 E. & B., 902.
Same Case, 88 Eng. Com. L., 902.

In United States *vs.* Tingey, supra, the court says:

> "There is no statute of the United States expressly defining the duties of a purser in the Navy. What those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to the court. If they are regulated by the usages and customs of the navy, or by the official order of the Navy Department, they properly constitute matters of averment and should be spread upon the pleadings."

In the case of U. S. *vs.* Jackson, supra, the action was upon a bond given by Jackson reciting that he had been appointed "collector of taxes" under the provisions of the internal revenue law, without specifying the district. The Supreme Court, affirming the judgment of the court below sustaining a demurrer to the declaration, says:

> "The duties for the performance of which these parties bound themselves were well defined. The person who was to perform them and for whose default they consented to become liable was named in the obligation, and the only matter of importance omitted was the place or district within which these duties were to be performed.
>
> "This appointment was a matter of public record. The evidence of it was the commission of Jackson, signed by the President and sealed. The district, therefore, for which he was appointed was known to the obligors and was a matter of public record, and we do not see how such a bond can be held to be void.
>
> "It would not depend on any parol proof. The production of the bond and commission makes complete the obligation of the defendants. That is certain in law which can be rendered certain.
>
> "*But there is no averment in the declaration anywhere that he has or had ever been appointed collector of any particular district. There is therefore, no foundation for proof of fact by the production of the commission or by any other evidence.* On a judgment by default no

> such commission could be introduced nor proof of non-performance in any district. No issue could be taken on the declaration as to his appointment or his obligation to perform the duties of any district, because there is no averment of any such obligation. The declaration affords no opportunity to render more specific the obligation of defendants by introducing the commission. It does not aver that this obligation for Jackson as revenue collector related to the duties of any particular district so as to enable the court to apply the covenant of the defendants to those duties."

It appears from this case that where there is a valid appointment to an existing office, although the bond upon its face may be indefinite as to the duties, if they can be rendered certain by any legal matter of record it may be done under proper allegations in the declaration. But in the case under consideration there is no office by law or regulation, no valid appointment, and no duties defined. The replications, corresponding to the declaration in the case of U. S. *vs.* Jackson, alleges what the duties were, but there is no proof of them. The case for the plaintiff, therefore, is quite as defective as in Jackson's case.

In the case in 2 Brock. it was claimed that there was no office created by law, and in reply it was contended that if that was so, then the bond should be considered as a common-law bond or contract. Chief Justice Marshall in that case said:

> "If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, *and such an office must exist with ascertained duties*, or there is no standard by which the extent of the condition can be measured."

The Chief Justice then finds that such an office was created by Army regulations and afterwards approved by Congress, prescribing duties of a purchasing quartermaster, com-

missary, and paymaster, and the manner of performance of these duties was specified in the regulations with considerable minuteness.

It is decided that the officer was irregularly appointed, but that as there was such an office, with well-defined duties, and he received money and failed to disburse it, he and his sureties were liable. The law prescribing his duties was considered as if embodied in the bond.

In Com. *vs.* Jackson, 1 Leigh, 485, *supra*, the hustings court of Williamsburg, without any authority of law for the act, appointed a collector of taxes for the city and took his bond with sureties for due collection, &c.: *Held* that the bond was not obligatory upon the sureties. There is no opinion, but from the argument of counsel it is apparent that the case turned on the point that the bond was void for uncertainty, as there was no duty prescribed by law by which the extent of liability could be measured.

The case in the 92d Ind. was the appointment of a city superintendent of water works, who had no defined duties, but at the same session at which the bond was approved the city council made it his duty to collect water rents, and it was decided that the sureties were not liable. The sureties upon an official bond can be held liable for the faithful performance of those duties only which adhered or were germane to the office at the time their undertaking was entered into, and not for other and different duties added to the office after the execution of the bond.

Mechem on Public Officers, Secs. 305 and 306.
Gaussen *vs.* U. S., 97 U. S., 590.
U. S. *vs.* Kirkpatrick, 9 Wheat., 720.
U. S. *vs.* Powell, 14 Wal., 493.

In the case last cited it is said that "any substantial addition by law to the duties of the obligor of a bond, after the execution of the instrument materially enlarging his liabilities, will not impose any additional responsibility upon

his sureties unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions," referring to Farr *vs.* Hallis, 9 Barn & Cress., 332. See also on the same subject—

Miller *vs.* Stewart, 9 Wheat., 703.
Converse *vs.* U. S., 21 How., 463.
White *vs.* East Saginaw, 43 Mich., 567.
Walsh *vs* Colquitt, 64 Ga., 740.

How can the above principle be enforced unless we know what the duties of the officer were when the bond was given, and whether they have since been changed and in what regard? What proof was there that it was the duty of Howgate under a bond with a penalty of $12,000 to receive and disburse the enormous sums charged against him in the "consolidated transcript," aggregating $1,132,742.32, in the brief period of two years? Can it fairly be presumed from anything found in the record that the sureties of Howgate at the time of the execution of the alleged bond contemplated that they were becoming responsible for the disbursement of such large sums of money? The indications in the record are that Howgate and the officers who required the bond of him had a very different understanding at the time. The order of the Secretary of War requiring him to give bond was that it should be "for the same amount and on the same form (so far as the latter is properly applicable) as is used for a *commissary of subsistance with the rank of captain*" (Rec., p. 54), and Howgate understood that a bond with such scope was what he was giving (see his letter of transmittal, Rec., p. 20). It must be presumed that his sureties had the same understanding. The record, then, shows that Howgate was to assume responsibilities similar to those of a commissary of subsistence with the rank of captain. The inevitable conclusion must be, in the absence of any law or order or regulation of the Secretary of War prescribing a different duty, that his duty was to be germane

to the kind and character of bond that he was required to give.

The 1140th section of the Revised Statutes provides for the number and rank of officers in the commissary department, and Section 1141 prescribes their duties to be, under direction of the Secretary of War, to purchase and issue to the Army such supplies as enter into the composition of the ration; and Section 1191 requires that they shall give bond in such sum as shall be required by the Secretary of War. There is a standing regulation of the War Department that the penalty of a bond to be given by a commissary officer with the rank of captain shall be $12,000. The number of enlisted men in the Signal Corps at the time Howgate gave this bond was 450 (19 Stat. at Large, Ch. 226). The penalty of the bond was about reasonable for the amount of money he would probably disburse annually in purchasing rations for this corps. It was ridiculously small if it was intended to secure the large amounts appropriated in 1878, 1879, and 1880, to pay for telegraphing weather reports, and the like, that appropriation being $350,000 in each of those years. It could not have been intended by the Secretary of War, Howgate or his sureties, when he gave the bond, that he was to receive or disburse these appropriations for these purposes. To so assume would be to hold that the Secretary of War was grossly neglectful of his duty.

It seems that the cases of U. S. *vs.* Jackson and U. S. *vs.* Maurice, *supra*, and other cases cited in the same connection establish the principle that, in order for a bond like the one in suit to be valid, *there must be some statute, or regulation of a department of record, fixing with reasonable certainty the duties of the principal.* There being none shown in this case, the bond is void for uncertainty; and it is further contended in this case that if it were proper to ascertain the duty of the officer by inference, in the absence of a clearly defined duty by statute or other record, the only inference that could be drawn from the evidence in the

record before the court is, that the duty of Howgate, in contemplation of the parties at the time the bond was given, was that of a commissary of subsistance; and the evidence on behalf of the plaintiff being that all the moneys which are shown to have come to his hands were for other and different purposes, the condition of the bond does not cover them and his sureties are not liable therefor. In this connection the suggestion is worthy of consideration that Section 1191 Revised Statutes is the only law authorizing the Secretary of War to require a bond, and that does not authorize him to require one for the purpose for which it is now contended that the one in suit was given by Howgate, and the presumption is that he required one that he was authorized by law to require rather that one he was not authorized to require.

It is submitted that it was the duty of the court to have given a binding instruction for the defendants upon this point. But if the state of the evidence was such that inference might be drawn as to the duty of the officer, those inferences were for the jury, and the instructions submitting that matter to them should have been given.

The Treasury Transcript.

The above mentioned document is found to be in the record from page 27 to 31, both inclusive.

The court erred in admitting this document in evidence. (See Rec., p. 31 for the defendants' objection to its admission and exception thereto).

The court also erred in refusing to strike out the said document at the close of the defendant's evidence. (See Rec., p. 66 for the defendants' motion to strike it out and exception to the refusal of the court to do so.)

The court also erred in instructing the jury at the instance of the plaintiff's counsel that the said document was prima facie

evidence of the indebtedness of Howgate to the United States. (Rec, p. 106.)

The grounds of error in admitting the transcript and in instructing as to its effect are as follows:

First. Because the certificates attached thereto are not in the proper form.

Second. Because the contents of the transcript are not such as are made evidence by the statute.

Third. Because the accounting officers of the Treasury had no power at the date of the alleged settlement set forth in said transcript to make the same, they having previously stated and settled an account with Howgate, and issued him a certificate of non-indebtedness.

Fourth. Because the moneys charged against said Howgate in said transcript are not covered by the condition of the alleged bond.

The Certificate to and Contents of the said Transcript.

As the certificate attached to the transcript and the contents of the latter are so intimately connected, the first and second objections my properly be considered together.

Section 886 of the Revised Statutes of the United States provides that in suits against any "person accountable for public money a transcript from the books and proceedings of the Treasury Department, certified" by the officers "charged with the examination of those accounts," shall be admited as evidence, and that the court may give judgment for the balance thereby shown, and that all copies of bonds or other papers "connected with the settlement of any account," when properly certified, shall also be admitted in evidence and have the same force and effect as the originals. The first part of the section clearly relates

to the account between the person liable for public money and the United States, as it appears and is recorded in the books and proceedings of the Treasury, and the last part relates to any paper connected with or relating to the settlement of such account and necessary or material to be considered with it in order to a proper understanding of it.

The Supreme Court has given this section substantially the foregoing construction in numerous cases, and has held that in order to render the transcript admissible, and allow it the effect prescribed in the statute, the certificate must indicate that it is a transcript of the whole account of the person whose bond is in suit as it appears in the books and proceedings of the Treasury Department, including the debits and credits, and showing the balance claimed, and that the transcript when examined must appear to be what the certificate indicates. Among the leading cases upon the question are:

United States *vs.* Hoyt, 10 How., 134.

United States *vs.* Pinson, 102 U. S., 548, and cases therein referred to.

See also—

United States *vs.* Brennerman, Gilpin C. C. R., 48.

Bruce *vs.* U. S., 17 How., 437.

U. S. *vs.* Jones, 8 Pet., 375.

U. S. *vs.* Edwards, 1 McLean, 476.

While the question in the United States *vs.* Pinson, *supra*, arose upon the form of a certificate, the court considered and adjudicated not only what was a proper form of the certificate, but also what should be actually embraced in the transcript—that is to say, that the transcript, when examined, should be found to contain what the certificate indicates, so that the reasoning of the court in that case applies as well to what are the proper contents of a transcript as

what is a proper form of certificate. The case is a leading one, and the opinion shows that it was carefully considered. On page 553 of the report Mr. Justice Harlan, delivering the opinion of the court, says:

> "The court in that case (Smith *vs.* The United States, 5 Peters, 300) recognizes the transcript from the books and proceedings of the department as a document which shows the account of the Government debtor as finally adjusted by the proper officers and as it appears upon the records of the department. Such adjusted accounts, says Mr. Chief Justice Taney, necessarily shows the charges against as well as the credits of the disbursing officer. They 'could not,' said he, 'be adjusted on the books in any other manner, and the transcript, or, in other words, the copy of the entire account as it stands on the books (which must include debits as well as credits), is made evidence by the law; nor do we see any reason for restricting the words of the act of Congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the Government and the individual. They are records of the proper departments, and are always open to inspection of the party interested.'"

Further along in the opinion, at page 554, the learned justice states:

> "It may be true, as the certificate of the deputy fourth auditor states, that the papers offered are true copies of some orginals on the files of his office—for instance, of the original drafts of settlement—but it does not necessarily follow that they present an accurate or correct statement of the *final settlement or adjustment of the accounts* as shown on the books and in the records of the proceedings in the department."

Further on he says:

> "What the statute meant was that the official certificate of the officer charged with the examination of the accounts should be of such character as to give the court as well the parties assurance that the transcript offered in evidence to support the claim of the Government exhibits, in fact, the final adjustment of the accounts of the delinquent officer as shown, not by mere copies of original papers on the files, but upon the books and records of the department."

Prior cases in the Supreme Court referred to in that opinion are all to the same point.

The certificate of the Third Auditor to the transcript is not in compliance with the rule as above stated by the Supreme Court. While not in the form of the one in Pinson's case, it is quite as defective. (Rec., p. 27.) Although plaintiffs are suing to recover an alleged balance on settlement or adjustment of Howgate's accounts, neither the word "account" or "settlement" or any equivalent term is used in the certificate, nor is the court informed by them that the transcript relates in any manner to the accounts of Howgate as property and disbursing officer of the Signal Corps.

The second certificate on page 27 the record is not, nor does it purport to be, a certificate under Section 886, but a certificate that the officer had examined and adjusted the accounts and ascertained a balance which is given on the following page (28), but he does not give nor purport to give a copy of the account.

The following is the form of certificate approved by the Supreme Court in the United States *vs.* Bell, 111 U. S., 477:

> "The annexed is a transcript of the books and proceedings of the Treasury Department in account with Miles H. Morris, late paymaster in the United States Navy, under bond of April 9, 1858."

Passing now from the certificate and looking into the Treasury transcript, we find that its contents in no respect

conform to the requirements of the statute. Referring to the "consolidated transcript," found between pages 28 and 29 of the record, it will be seen that it contains only aggregates of debits and credits for different years under the separate heads of various appropriations, showing a balance, ascertained from these aggregates, of $133,255.22 claimed to be due from Howgate to the Government.

None of these items composing these aggregates, as they appear in the account in the books and proceedings of the Treasury Department, between Howgate and the United States, as the account was finally adjusted by the accounting officers, appears in this transcript. If it be said that the copies of the accounts-current for the various months rendered by Howgate (pages 29 and 30 of the record), show the items of charge against him, the answer is that his admission of receipts alone cannot be shown by a Treasury transcript. It, in order to be admissible as evidence under the statute, must show both sides of the entire account. That is what the statute make evidence, and no segregated part of it. The law was enacted for the convenience of the Government and is an innovation upon the common-law rules of evidence, and its scope cannot be enlarged by construction. These principles are well settled by the decisions of the Supreme Court and have always been followed by the circuit and districts courts of the United States.

United States *vs.* Jones, 8 Peters, 375.
Gratiote *vs.* United States, 15 Peters, 336.
United States *vs.* Eckford, 1 How., 250.
Bruce *vs.* United States, 17 How., 439.
United States *vs.* Stone, 106 U. S., 525.

In the case in 8th Peters there was this item in the Treasury transcript, to wit:

> "To accounts transferred frem the books of the second auditor for this sum, standing to his debit under said contract on the books of the second auditor, transferred to his debit on those of this office, $45,000."

The defendants in that case did not object to the admission of the transcript, but objected to certain items in it as not being properly proved or provable by the transcript, and this was one of them. This item, on motion of the defendants' counsel, was ruled out from the consideration of the jury by the court below, and the Supreme Court, by Mr. Justice McLean, in sustaining that ruling, says:

> "This item was properly rejected by the circuit court. The act of Congress in making a transcript from the books and proceedings of the Treasury evidence does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. On the trial the defendant shall be allowed no credit on vouchers which have not been rejected by the Treasury officers unlesss it was not in his power to have produced them; and how could a proper effect be given to this provision if the credits be charged in gross? The defendant is unquestionably entitled to a detailed statement of the items which compose his account."

In Bruce *vs.* United States, *supra*, the court says:

> "The books of the accounting officers necessarily contain the charges as well as the credits of the disbursing officer. The accounts could not be adjusted on the books in any other manner, and the transcript or, in other words, the copy of the entire account as it stands on the books (which must include debits as well as credits) is made evidence by the law."

The following extract from the opinion of Judge Hopkinson, reported in Gilpin C. C. R. (p. 48), is sustained by all the cases upon the subject:

> "The question to be tried by this jury is the correctness of this adjusted, reported balance; but if it is allowed to prove itself what is to be tried? If a Treasury certificate that such is the balance re-

> ported to be due is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretence, an useless form which might be dispensed with, and the judgment entered at once on the production of the certificate. This cannot be the intention of the law. The whole cause of controversy must be put into possession of the court as it exists in the Treasury Department, and thereupon the court and jury will pass their judgment."

It is, therefore, respectfully submitted that neither the certificates attached to said alleged transcript, nor the contents thereof, are such as render them competent evidence, and the court erred in admitting them.

The accounting officers of the Treasury had no jurisdiction to state the account embraced in the transcript.

The transcript shows upon its face that the account therein contained was stated on the 7th day of October, 1884 (see Rec., pp. 27 and 30).

The defendants' evidence (Rec., pp. 36 to 58, both inclusive) shows that Howgate's accounts had been stated and settled by the accounting officers of the Treasury from time to time as the same had been rendered by him, and that on the 18th day of December, 1880, his resignation was accepted, and he left the Government service. An officer, before retiring from the military service, must furnish certificates from the several accounting officers that he is not indebted to the United States (Rec., p. 51). Howgate furnished these, and copies of them are in the record on pages 37 to 50, both inclusive, and on page 47 is the one from the Third Auditor of the Treasury, whose duty it was to settle the accounts relating to the Signal Corps. These certificates conclusively establish the fact of the settlement of Howgate's accounts now in controversy prior to the 1st of January,

1881, and the testimony of Mr. Baxter and Mr. Hatch (Rec., pp. 55 to 63, inclusive, and pp. 71 to .77, inclusive) shows that they were stated and settled from time to time as rendered, and Howgate notified of the result. It is also proved conclusively from these certificates that when Howgate retired from the service, on the 18th day of December, 1880, the books and proceedings of the Treasury Department in relation to his accounts showed that he was not indebted to the United States on any account whatever.

Accounting officers of the Treasury in auditing and settling the accounts of an officer act in a *quasi* judicial capacity, and one acting thereon exhausts their power, and afterwards they have no power or jurisdiction to restate or alter them in any way to the prejudice of the officer, except to correct clerical errors of computation and the like.

Opinions of Attorney General, Vol. 1, pp. 625–629.
Id., Vol. 2, pp. 624–629.

They are stated or settled accounts and can only be changed by consent, or surcharged and falsified by proper pleadings and proofs between the parties thereto in a court of competent jurisdiction.

U. S. *vs.* Bank of Metropolis, 15 Peters, 400.
U. S. *vs.* Jones, 8 Peters, 375.
U. S. *vs.* Collier, 3 Blatch., C. C. R., 325; see especially pp. 352–'3.
Ex parte Randolph, 2 Brock., C. C. R., 447; see especially 473–'4–'5 and authorities there cited.
United States *vs.* Kuhn, 4 Cranch., C. C. R., 401.
Soule *vs.* United States, 100 U. S., 8.

The case last cited holds that the accounting officers may correct errors of computation in a stated account—that is, errors appearing upon the face of the account.

Upon the effect of a stated account and the method of impeaching the same, see—

Brown *vs.* Vandyke, 4 Hals. Ch., 795; 55 Am. Dec., 250.

Langdon *vs.* Roan's Admr., 6 Ala., 518; 41 Am. Dec., 60.

The moneys charged in the transcript are not covered by the condition of the bond.

The transcript of the settlement above referred to, made October, 1884, shows (Rec., p. 28) that at the time of the institution of the suit the Government claimed that Howgate was indebted in the sum of $133,255.22, on account of money appropriated to pay for "observation and report of storms," and for "construction, maintenance and repair of military telegraph lines."

There is absolutely no evidence in the record tending to show that it was the duty of Howgate to disburse money for these purposes, but as hereinbefore stated, if any inference can properly be drawn from the orders of the Secretary of War requiring him to give bond, that inference is that he was to have only the responsibility of a commissioned officer, and disburse money only for commissary purposes.

The transcript was incompetent until and unless it had been shown by proper proof thas it was his duty to disburse these moneys, and that it was fairly in the contemplation of the parties at the time the bond was given that the condition thereof covered this duty. And no evidence of such tendency having been given no foundation was laid for the introduction of the transcript, and it should have been rejected.

The judgment against Howgate was not competent evidence against the surety.

The defendants having given evidence, hereinbefore referred to, proving that all Howgate's accounts had been settled by the accounting officer of the Treasury, and he found and certified by them not to be indebted to the United States on any account whatever, the plaintiffs, in order to impeach such settled and stated accounts, offered in evidence—first, a judgment in favor of the plaintiffs against Howgate, entered by default in the Supreme Court of the District of Columbia on the 24th day of May, 1883, in a suit instituted against him alone on the 24th day of August, 1881. (Rec., pp. 67 and 71, inclusive.) To which evidence the defendants objected and excepted. (Rec., p. 67.) The record of that case shows that it was an action of assumpsit on the common counts, and that judgment was entered for want of plea upon the appearance by attorney only. The record shows conclusively that the stated and settled account was in no manner surcharged or falsified, but the judgment was rendered for the amount of certain items stated in the bill of particulars. That that judgment was admitted and offered for the purpose of impeaching that account appears from the offer, objection and exception thereto (Rec., p. 67), and from the instructions given the jury and excepted to by the defendants. (Rec., p. 109, instructions 14, 15 and 16.) This was incompetent evidence—first, because, according to the authorities hereinbefore cited, where a stated account is proved, before evidence impeaching it is admissible there must be a pleading setting forth in what particulars and in what items the stated account is erroneous, false or fraudulent. The stated and settled accounts of Howgate, proved by the defendants, fully sustained the plea of conditions performed. In order to have made any evidence impeaching that settle-

ment admissible in this case the plaintiffs should have replied to the plea of conditions performed, specific facts, impeaching that account in specific items, that defendants might have been informed what items would be contested. Plaintiffs had in their possession when the plea was filed the evidence which they then knew would be sufficient to support and prove the plea of conditions performed, and they alone had the knowledge of what items they contended were erroneous. It was due to the defendant that they should have been informed of the specific grounds and items upon which the plaintiffs would demand judgment against them. This would have been the rule even if Howgate had been the defendant. It is for a stronger reason to be enforced when the surety is the sole defendant, especially where, as in this case, the Government notified him, in 1880, that Howgate was not indebted to the Government, had been honorably discharged, and he relieved of all liability as surety; and no notice to the contrary until nearly four years later, when this action was brought.

A second reason why the said judgment is not evidence is because Moses was not a party to it and had no notice of it. Nor had he any notice at the time of the rendition of the judgment against Howgate that the Government claimed that there was any liability upon him as one of Howgate's sureties, the judgment against Howgate having been entered on the 24th day of May, 1883, and this suit not having been instituted until the 29th day of September, 1884. The weight of authority as well as the better reason is in favor of the rule that a judgment against the principal debtor in a case like this is not evidence in a subsequent action against the surety to prove the default of the principal unless the surety had notice of the suit and defended or had an opportunity to do so. The result of the authorities is

well stated in Brant on Suretyship, Section 524, as follows (Sec. 35):

> "Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice and the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery only and not of any fact which it was necessary to find in order to recover such judgment."

See the authorities referred to by the author in a note to this section, and also the note of the editor of the American Decisions, Vol. 83, p. 380 et seq., where he reviews the cases and approves the rule as stated by Mr. Brant.

The case of Drummond *vs.* Prestman, 12 Wheaton, 515, is not an authority for the admissibility of the judgment in this case. There the principal made a settlement in the ordinary course of business admitting an amount due and subsequently confessed judgment for the admitted amount, and it was said to be evidence because of the admission of the principal, which is always evidence against the surety where made in the usual course of business as to become part of the *res gestæ*.

1 Greenl. Ev., par. 187.

Two other cases are relied on by the court below to sustain the admissibility in evidence of this judgment *as proof of Howgate's defalcation:*

McLaughlin *vs.* Bank, 7 How., 229. This was the case of a suit against the surety on an administrator's bond, as to which, under the authorities, a different rule obtains; and

U. S. *vs.* Allsbury, 4 Wall., 186. In this case separate suits had been brought against the principal, a paymaster, and the administrators of Allsbury, a surety on his

bond, to recover $20,085. On the trial of the suit against the principal verdict and judgment was had for $10,318.23. This judgment was pleaded by the defendants in the other suit *puis darrein continuance* to reduce the recovery to that amount. It was admitted by the court and the jury instructed accordingly.

This court, in its opinion delivered by Mr. Justice Nelson, said: "The liability of the surety cannot exceed that of his principal; and that amount having been fixed by a judgment at law, it formed the rule to determine the sum to be recovered in this suit." "The verdict and judgment were competent evidence *on behalf of the surety* for this purpose; indeed the highest evidence of the fact." "*Other questions would have arisen if this judgment had been offered against the surety.*

Attention is also called to the fact that the record of said judgment against Howgate makes no claim nor gives any intimation that the suit was brought to recover money which had been placed in the hands of Howgate to disburse as disbursing officer of the Signal Corps. On the contrary, in the particulars of demand filed with the declaration, the charges against him are for "*money unlawfully drawn and obtained by him from the Treasury of the United States*, on the following checks, drawn by him on the Treasurer of the United States." (Rec., p. 68.) And in the affidavit for attachment annexed to the declaration, in stating the ground of the plaintiffs' claim, as required by the Statute (see R. S. U. S., D. C., par. 782), the following language is used:

> "That an investigation has, for a short time, been going on by the Government, into the accounts of the said defendant (Howgate) as disbursing officer of the Signal Service of the United States Army, and is still going on; that such investigation has developed that the defendant (Howgate) has unlawfully drawn from the United States Treasury, on the checks mentioned in the particulars of demand, and appropriated to his own use, a very large sum of money."

There is no allegation in the declaration, or affidavits, nor intimation in the record, that the cause of action for which that suit was brought was money intrusted to Howgate as disbursing officer of the Signal Service, and which he had failed to account for according to law. This affidavit was made August 24, 1881, and it does not seem to have occurred to any officer of the Government that it was money for which the sureties were liable on the alleged bond, until the 29th of September, 1884, more than three years afterwards, during which time the Government, by its suit in attachment, had appropriated to the payment of its claimed debt against Howgate all the property he had.

The oral evidence in rebuttal tending to impeach the stated and settled accounts proved by the defendants was inadmissible.

The evidence consists of the testimony of John S. Hatch (Rec., pp. 71 to 82) to the admission of which exception was taken (Rec., p. 77), and the depositions of Rochester and Bates (Rec., pp. 83 to 93), to the admission of which exception was taken (Rec., pp. 82–3), and copies of the alleged false and forged vouchers (Rec., pp. 93 to 100), to the admission of which exception was taken. (Rec., p. 101.)

The tendency of this evidence was to prove that the vouchers referred to in the transcript admitted in evidence as rejected or suspended and which went to make up the balance claimed by the Government against Howgate were fraudulent and forged.

The evidence was inadmissible, first, because there is no pleading in the record by the plaintiffs below impeaching the stated accounts; and, secondly, because the moneys drawn upon these alleged forged papers are not shown to have gone into Howgate's hands as disbursing officer of the Signal Corps within the meaning and contemplation of the alleged bond.

In this connection it may be proper to suggest that the plaintiffs in error ought not to be prejudiced in any way by the check payable to W. B. Moses or bearer. His name nowhere appears upon it, and a witness, Mr. Hatch, originally produced by defendants in error, says that in the usual course of business it was paid to Howgate. (Rec., p. 105.) There is no evidence tending to show that Moses had any knowledge of the check, ever saw it or ever received any of the money mentioned in it, and defendants in error have not claimed that he did.

The said W. B. Moses was discharged from liability as one of the sureties of Howgate by the acts of the defendants in error.

After the close of the evidence the plaintiffs in error requested the court to instruct the jury that if they found from the evidence that after Howgate ceased to be property and disbursing officer the proper officers of the Treasury stated and settled his accounts and issued him a certificate of non-indebtedness to the Government and paid him his salary, and that the said W. B. Moses had notice or knowledge of this fact, that the Government was thereby estopped from claiming judgment against him in this case, and that Moses must be presumed to have known what appeared of record in the Treasury Department in relation to Howgate's accounts. But the court refused to give such instructions or either of them, and the plaintiffs in error excepted. (See Rec., pp. 108–9, instructions 10 and 11, and p. 110 for the exceptions.) It is respectfully submitted that these instructions should have been given.

It is not contended that the Government is liable for mere negligence or that the failure to settle the accounts of disbursing officers promptly as required by law will have the effect of discharging his sureties. In this case the evidence shows positive acts and representations of the Government in relation to the state of Howgate's accounts and the

claims of the Government against him and his sureties, that had the effect of misleading Moses to his prejudice and inducing him to change his position in relation to his principal, so that it would be inequitable and unjust to permit the defendants in error to now claim that such representations were not true.

Howgate's accounts were settled by the proper accounting officers of the Treasury, and he resigned and his resignation was accepted on the 18th of December, 1880, and certificates of non-indebtedness were issued to him by each department of the Government to which he had been liable for money or property. Although his resignation was accepted on the 18th day of December, 1880, he was not paid the balance of salary due him until he obtained his certificates of non-indebtedness. This was in accordance of Army Regulations. (Rec., p. 51.) On the 26th of April, 1881, the Third Auditor of the Treasury, whose duty it was by law to settle the accounts of Howgate, issued a certificate as follows (Rec., p. 47):

Certificate of Non-indebtedness.

TREASURY DEPARTMENT,
THIRD AUDITOR'S OFFICE,
April 26, 1881.

It is hereby certified that the accounts and returns of H. W. Howgate, Lt. 20th Inft., late acting Signal Officer, U. S. A., have been examined, found correct, and closed. This certificate is granted to satisfy the pay department that the above-named officer is not indebted to the United States on the books of this office at the date hereof.

E. W. KEIGHTLEY,
Third Auditor.

And on the following day the balance of salary due Howgate was paid him. (Rec. p. 48.)

Moses must be presumed to have known of this settlement. It was matter of public record in which he was interested. The Supreme Court, speaking of records of such settlements in the Treasury, says: "They are records of the proper departments, and are always open to inspection of the party interested." U. S. *vs.* Pinson, 102 U. S., 553.

This record was notice to Moses that the Government had no claim against Howgate, or lien on account of the matters embraced in the alleged bond, whatever they might have been, and he was absolved from all liability on account thereof. He had no notice to the contrary until the institution of this suit on the 29th day of September, 1884. It is true that the Government instituted a suit against Howgate on the 24th day of August, 1881 (Rec., p. 67), but there is no evidence tending to show that Moses had any actual knowledge of that suit, and if there can be any presumption that he had such knowledge, there is nothing in the record of it to suggest that the Government claimed that he was liable for any part of the moneys sued for in that action. On the contrary that record shows that that suit was "for money unlawfully drawn and obtained by him [Howgate] from the Treasury of the United States" (Rec., pp. 68–9).

In that action the defendants in error attached all of Howgate's property at the institution of the suit, from which they realized the sum of $28,038.84, more than twice the penalty of the bond sued on in this case. (See Rec., pp. 31–35.) The document here found, introduced by the defendants in error is a supplemental statement of Howgate's accounts in which they give him credit for the sum above mentioned, and reduced the balance of $133,255.22, claimed in the transcript of November, 1884, to $105,216.38.

This shows conclusively that at the time of the settlement with Howgate in 1880, as well as at the date of the institution of the Government's suit against him in August, 1881, that he had ample property to indemnify Moses as his surety, and the presumption is that when Moses became surety he took indemnity and when he was informed of the end of his liability by Howgate's settlement he surrendered it, and changed his position in that regard. Certainly, if the Government intended to hold him liable on the bond, good faith required that they should have notified him of Howgate's defalcation as soon as it was discovered, that he might have taken steps to protect himself by obtaining indemnity, or by paying the penalty of the bond and attaching Howgate's property for the amount. But instead of this, while Moses was resting upon the assurance given by the Government that Howgate was not indebted to the Government, defendants in error attached all his property, without the slightest intimation that they claimed any liability on the bond, until more than three years later when they sued Moses. Such inequitable conduct estops the Government from maintaining this suit.

U. S. *vs.* Alexander, 110 U. S., 325.

That was a suit upon a distillery warehouse bond. The defendant pleaded that the taxes, to recover which the suit was brought, had been abated by order of the Secretary of the Treasury. The statute authorized the Secretary to abate the taxes and to cancel the bond on either satisfaction thereon in whole or in part. The order of the Secretary abated the taxes without cancelling the bond or entering satisfaction thereon. The Government replied to the defense that the Secretary subsequently revoked the order abating the taxes. In the opinion of the court sustaining the defense and hold-

ing that the sureties were discharged by the action of the Secretary it is said:

> "It may fairly be presumed that sureties take indemnity from their principals. We cannot hold that after they have had notice of the discharge of the bond on which they were sureties, and when their relation to their principal may have entirely changed, and their indemnity been surrendered, it is within the power of the Secretary of the Treasury, without notice to them, to revive the bond, and reimpose its obligations upon them."

W. L. COLE,
WM. F. MATTINGLY,
Attorneys for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM H. MOSES ET AL., ADMINISTRATORS of the estate of William B. Moses, deceased, plaintiffs in error,
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STATEMENT.

On July 25, 1876, First Lieut. H. W. Howgate, brevet captain U. S. A., then acting Signal Officer and assistant, was assigned to duty as property and disbursing officer, Signal Service, U. S. A. (Record p. 19). On the — day of March, 1878, he entered into bond to the United States (p. 24) in the penalty of $12,000, with William B. Moses and Lebbeus H. Rogers as sureties. This bond recites that Howgate has been assigned to duty as a property and disbursing officer, Signal Service U. S. A. and has accepted said assignment, and its condition is that Howgate "shall during his holding and remaining in said office carefully discharge the duties

thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of the Signal Service, U. S. A., without fraud or delay." The bond was accepted and approved April 2, 1878 (p. 21). From that time until his resignation, December 18, 1880, Howgate, as such property and disbursing officer, received public money to the extent of $1,182,742.32, of which he failed to faithfully expend and honestly account for the sum of $133,255.22.

In the fall of 1880, just prior to his resignation, Howgate, by means of false, fraudulent, and forged vouchers, succeeded in having the Treasury Department pass and balance his accounts (p. 32 *et seq.*). Shortly thereafter these frauds were discovered, and, on August 24, 1881, suit was brought in the supreme court of the District of Columbia (p. 62) against him by the United States to recover $101,257.08, part of the money represented by these vouchers. Attachment was issued against Howgate's property. He appeared by counsel and a personal judgment was regularly entered against him (p. 70) for the amount claimed. This judgment on appeal was affirmed by the general term. The proceeds received in 1886 and 1889 from the property attached were credited on his account, as shown by the Treasury transcript (p. 29). This reduced the amount of the defalcation to $105,216.38, which represents the actual loss of the Government.

The Treasury Department, after the discovery of the frauds, restated the accounts of Howgate, disallowed the false, fraudulent, and forged vouchers, and found the bal-

ance due by him as shown by the Treasury transcript (p. 29) to be as above $133,255.22. On September 29, 1884, this suit was brought on Howgate's bond. Service was had only on Moses; the other defendants were returned *non sunt*. Pleas were filed by Moses. Issue was joined on all except such as were disposed of by demurrer. The replication (p. 7) to his seventh plea sets up the condition of the bond and the breach. An amended declaration (p. 5) counting on an unsealed instrument was filed April 19, 1890. This was withdrawn by the plaintiff (p. 101). Moses having died, his administrators were made parties defendant (p. 11). The case was tried against them, beginning March 22, 1893, and verdict and judgment in favor of the plaintiff was rendered March 28, 1893, for $12,000, the amount of the bond, with interest from September 29, 1884. Motion for new trial was overruled; the case was heard on bills of exception by the court of appeals of the District of Columbia, and the judgment below was affirmed, whereupon there was a writ of error to this court.

The errors assigned in appellants' brief are:

(1) The refusal of the court to instruct the jury that if they believed that Howgate added the seal to Moses's name without his knowledge or consent, it was not the bond of Moses; and an alleged variance.

(2) The refusal of the court to allow certain testimony under the claim that the bond was extorted and given under duress.

(3) The bond is void for uncertainty.

(4) The admission in evidence of the Treasury transcripts.

(5) The judgment against Howgate was not competent evidence against the defendants.

These will be considered seriatim for purposes of convenience:

I.

There was no error in the refusal to instruct as prayed by appellants that the bond sued upon by reason of its alleged alteration was not the bond of Moses.

It is claimed that the bond was not sealed by Moses when it was returned by the Department to Howgate "to have proper seals affixed" (p. 21); the contention is, this made him the agent of the Government for that purpose, and if he sealed it without the knowledge or consent of Moses it avoided the bond. But this position can not be maintained. Howgate was not the agent of the Government for that purpose; he was the agent of the sureties, trusted by them with this instrument, which recited (p. 24) "sealed with our seals," etc., for the purpose of submitting it as a bond to the proper tribunal for acceptance and approval.

The bond was accepted in the belief that it had been properly executed. There is no claim that the Secretary of War, who accepted it, had any notice of the alleged improper sealing, if it was improperly sealed. He acted in good faith; and, as between two innocent parties, there can be no question as to which must suffer.

Murfree on Official Bonds, sec. 761.

Butler v. *U. S.*, 21 Wall., 272.

Dair v. *U. S.*, 16 Wall., 1.

Met. Life Ins. v. *Bender*, 124 N. Y., 49.

> The utmost vigilance would not save the public from the serious losses if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. (*Dox* v. *P. M. Genl.*, 1 Pet., 318.)

The proof of the signature of William B. Moses carried with it the presumption that his seal likewise was genuine.

Hall v. *Bainbridge*, 12 Q. B., 699.

1 Phillips Evidence, Ch. X, sec. 2.

Edelin v. *Saunders*, 8 Md., 118.

The learned justice of the court of appeals, commenting on this assignment of error, said (p. 117):

> The fact that a paper was imperfectly executed in the first instance, and that it was returned to the principal party concerned in it for proper execution, raises no presumption whatever against its genuineness, when afterwards it is produced with all the indications of genuine execution. On the contrary, the presumption is that the parties did what they ought to have done. The presumption is that Moses did not intend to perpetrate a fraud upon the United States by palming off upon them as an instrument under seal a document which was not in fact under seal, although he had solemnly certified over his admitted signature that it was under seal. The presumption is that when he signed the instrument he intended to affix his seal to it, and that the omission was one of inadvertence. And the presumption further is that when the bond was returned to his principal in order to have the seals affixed, and it was again delivered to the Department with the seals affixed, the act of affixing the seal was the act of Moses.

The argument on behalf of the defense is that the return of the bond by the War Department to Howgate was a

delivery of it to its own agent; and that if the sealing was done by Howgate it was an alteration of the instrument by an agent of the United States. But this is a totally erroneous conception of the relations of the parties. Howgate was an employee, it is true, of the United States; but in this instance he was dealing with them as man with man. He and they were alike principals in this transaction, and it would be a perversion of fact to assume that they were dealing with each other as principal and agent. Whatever agency is to be presumed in the matter would rather be, if any there were at all, of an agency from Moses to Howgate to make the document all that it was plainly intended by both of them that it should be, if we are to assume that they intended to act honestly in the matter.

It is argued, however, that the evidence fails to show that after the first delivery of the paper to the War Department it was ever again seen by Moses, or ever sealed by him. But herein is the weakness of the defense. It was incumbent on the defendants to show that it had not in fact been sealed by Moses, or by his authority. The plaintiffs, as we have seen, had made prima facie proof of their case, had proved the signature of Moses, and had thereby raised the presumption of the genuineness of the seal and of the complete execution and delivery of the bond by him; and it was for the defendants to rebut the presumption and to disprove the sealing by Moses. This by their own showing they have entirely failed to do.

The authorities cited on behalf of the defendants utterly fail to sustain their contention. The case of *Edelin*

v. *Saunders*, 8 Md., 118, so far as it is at all in point, is antagonistic to that contention; and in the cases of *Follett* v. *Rose*, 3 McLean, 322; *United States* v. *Linn*, 15 Pet., 290; *State* v. *Humbrid*, 54 Md., 327, and *Chilton* v. *People*, 66 Ill., 501, the instruments sued upon as sealed instruments, when actually produced at the trial, were shown not to have any seals at all affixed to them.

In a well-considered case, decided by the New York court of appeals in 1891, reversing the judgment below, the cases relied on by the appellants (*Gilkeson* v. *Humbird*, 54 Md., 337, and *Barnet* v. *Abbott*, 53 Vt., 120) are reviewed and the Vermont case is expressly disapproved. The court says (p. 51):

> The recital of a material fact in a bond, which is accepted by the obligee and acted on in the belief of the truth of the statement, estops the obligor from showing in an action on the bond that the recital is not true. (*Atlantic Dock Co.* v. *Leavitt*, 54 N. Y., 35; *Cady* v. *Eggleston*, 11 Mass., 282–285; *Dyer* v. *Rich*, 1 Met., 180; *Washington Co. Ins. Co.* v. *Colton*, 26 Conn., 42; *Trimble* v. *State*, 4 Blackford, 42; Big. Est. (5th ed.), 382.)
>
> *Gilkeson* v. *Humbird* (54 Md., 337) and *Taylor* v. *Glaser* (2 S. and R., 502) are types of cases holding that when a penal bond is delivered to and received by the obligee without seals, a recital therein that it is sealed does not make it a specialty or estop the obligor from denying that he is liable as on a sealed instrument, a rule which no one would dispute, but which is not related to the case in hand. *Barnet* v. *Abbott* (53 Vt., 120) is in point. * * *
>
> The case last cited seems to be opposed in principle to those previously referred to, and to lay down a dangerous rule. A great variety of bonds are in

use in this country, bonds conditioned to secure the payment of money, the performance of contracts, the faithful discharge of duties by trustees and by public officers, which recite that they are executed under seal, and they generally are. It is usually impossible to prove the genuineness of the common-law seal in use in this State, which consists simply of an impression made on a round bit of paper affixed to the instrument by mucilage, or by a wafer. There are differences in signatures by which they may be identified and proved, but there are none in seals. Sometimes, though not usually, the execution of bonds is acknowledged, but many are not, and the certificate ordinarily used recites that the person named acknowledged that he executed the instrument, not that he signed, sealed, and delivered it, and the acknowledgment is but evidence, not proof, of due execution of the instrument acknowledged. In an action on a penal bond in which it is recited that it is executed under seal, the obligor is estopped from denying that it was so executed when it appears by his own evidence that he knew the difference in the legal effect between sealed and unsealed instruments; that he read, subscribed, and placed it in the custody of the person interested in having it accepted, when it also appears that that person seals and delivers it to the obligee, who receives and acts on it in good faith. A different rule would open the way for cutting down by oral evidence the duration of obligations from twenty to six years.

Under this assignment of error the defendants assert a variance in date between the bond declared on and the one produced in evidence. There was no variance. The date of the bond was incomplete. It was accepted and approved April 2, 1878 (p. 21).

If there had been a variance, the motion came too late. The bond was admitted in evidence in the testimony in chief (p. 24); the only objections offered (p. 26) related to the matter of the seals. The second count was on an unsealed instrument, as to which no evidence had been offered. After the plaintiff closed its testimony in rebuttal the point was first made by a motion to strike out the bond (p. 96).

The objection should have been made when the bond was offered in evidence. (*Roberts* v. *Graham*, 6 Wall., 578).

Allegations in a pleading of time, quantity, value, etc., need not be proved with precision (*United States* v. *Le Baron*, 4 Wall., 642); and no variance ought ever to be regarded as material where the allegation and proof substantially correspond or where the variance was not of a character which could have misled the defendant at the trial.

Nash v. *Towne*, 5 Wall., 689.

Phillips v. *Smoot*, 1 Mackey, 478.

Furthermore, the court would have allowed an amendment; the defendants could not have pleaded the statute of limitations against the Government; nothing could have been gained by them. They were not in anyway damnified by the refusal of the motion.

II.

There was no error in the refusal to allow Crosby's testimony (pp. 64, 65) under the claim that the bond was extorted and given under duress.

The offer was to prove by this witness, then the chief clerk of the War Department, that, acting under verbal directions from the Secretary of War, he informed Howgate that unless he executed the bond he must cease to act as property and disbursing officer and would be removed from that position, and that it was under this pressure that the bond was executed and that he objected to its execution.

The court properly overruled the offer, because any official direction to or communication with Howgate would necessarily be matter of record in the Department. The correspondence on the subject was introduced in evidence (p. 20). In this the Secretary did not order his chief clerk, this witness, to "cause" Howgate to give bond. The communication is addressed to the Chief Signal Officer (p. 54), and thereupon Howgate writes (p. 20) to the Secretary that "in compliance with what I understand to be the wishes of the Department I have the honor to inclose" the bond.

Furthermore, the proposed offer does not make a case of duress or extortion *in colore officii* either as to Howgate or to Moses, his surety; as to the latter, the offer is altogether silent. There was no pretense of threat to remove him from his office in the Army, but only the assertion that if he desired to retain the assignment as "property and disbursing officer" he must give a bond, just as every other Government officer handling the public money.

The bond itself, duly executed, is prima facie evidence that it was voluntarily entered into. (*United States* v. *Mora*, 97 U. S., 413.)

A voluntary bond taken by the United States for a lawful purpose is valid, though not prescribed by any positive law. It is founded upon a sufficient consideration and intended to subserve a lawful purpose.

United States v. *Bradley* (10 Pet., 343).
United States v. *Hodson* (10 Wall., 395).
Tyler v. *Hand* (7 How., 573).
Jessup v. *United States* (106 U. S., 147).

It does not constitute duress or extortion that the bond was executed because the Department had given such directions. (*Soule* v. *United States* 100 U. S., 12.)

The case of *United States* v. *Tingey* (5 Peters, 115), cited by appellants, was decided on a demurrer to pleas; this demurrer admitted that the bond with a condition variant from that prescribed by law was, under color of office, extorted from Deblois and his sureties contrary to the statute by the then Secretary of the Navy, as the condition of his remaining in the office of purser and receiving its emoluments. The court says (p. 129):

> There is no pretense, then, to say that it was a bond voluntarily given, or that though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond, for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law. It would

be very different where such a bond was by mistake, or otherwise, voluntarily substituted by the parties for the statute bond without any coercion or extortion by color of office.

It had already announced in the same case (128):

> We hold that a voluntary bond taken by authority of the proper officers of the Treasury Department, to whom the disbursement of public moneys is entrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is in our view an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view.

The duress which the defendant offered to prove was to the effect that if Howgate did not give such a bond as was required of him he would not be permitted to retain the office of property and disbursing agent to which he had been appointed. There was no threat of loss of office or emoluments. Howgate's standing in the Army was not menaced. He could continue as "property and disbursing officer" if he gave the bond; he desired to continue to act under that assignment rather than to perform other military duty; he accordingly chose to give the bond "in compliance with the wishes of the Department." (*Hamilton* v. *Dillin*, 21 Wall., 91.)

Again, even if the offer constituted, in law, duress, that is a personal defense, which can only be set up by the per-

son subjected thereto. Duress to the principal will not avoid the obligation of a surety unless the surety at the time of executing the obligation is ignorant of the circumstances which render it voidable by the principal. (6 Amer. and Eng. Ency. Law, 96.)

III.

The bond is not void for uncertainty.

The uncertainty, which it is claimed avoids this bond, is alleged to consist in the fact that there is no law creating any such office as "property and disbursing officer, Signal Service, U. S. Army," or defining the duties of any such office or officer. Nevertheless, his duties and responsibility had been prescribed by authority of the Chief Signal Officer, with the sanction and approval of the Secretary of War. He had charge of all matters pertaining to money and property under the care, control, and administration of the Signal Service of the U. S. Army, and these duties were in contemplation of the parties. The very name and title which designated the officer itself defined his functions and duties.

The Revised Statutes of the United States provide:

> SEC. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.
>
> SEC. 1094. The Army of the United States shall consist of * * * a Chief Signal Officer.

> SEC. 1195. There shall be one Chief Signal Officer, with the rank of colonel of cavalry, who shall have charge, under the direction of the Secretary of War, of all signal duty and of all books, papers, and apparatus connected therewith.

It appears from the defendants' testimony (p. 53, 54) that the occasion which called for the giving of the bond was the request of the Chief Signal Officer to the Secretary of War for an advance of $50,000 of public money to Howgate, as disbursing officer, Signal Service, and the Secretary suggests that the requests for advances should be for a less amount or should not exceed $25,000 at any one time. In view of their own proof of what was in contemplation of the parties, appellants gravely argue that this officer was bonded to protect his annual disbursements in purchasing rations for the Signal Corps. That the penalty of the bond signifies nothing is apparent in the case of other officers handling public money.

But it will be seen from both of the transcripts (pp. 28, 29) that Howgate stands indebted for each of the fiscal years (F. Y.) 1879, 1880, and 1881, in excess of this bond, on account of "Observation and report of storms;" this matter was specifically committed by the Secretary of War to the Chief Signal Officer of the Army (pp. 13, 14). It also appears from these transcripts that Howgate stands indebted in excess of this bond, on account of "Construction, maintenance, and repair of military telegraph lines;" this matter was likewise specifically committed by the same authority to the Chief Signal Officer (pp. 13, 14).

The court properly instructed the jury (p. 106) that the defendants were liable for such money as Howgate

actually received as such officer and failed to pay over or properly account for.

The strict construction which, for the benefit of sureties, the law accords to their obligations does not exclude a fair construction of the instrument from which those obligations are derived. (Murfree on Bonds, sec. 202, and cases cited.)

The language of this court on this subject is explicit:

> The record proves that all the moneys in the hands of the principal were moneys remitted to him as purser, as is fully shown both by his requisitions and the Treasury warrants issued by the proper officer of the Treasury Department.

It was accordingly held that—

> The sureties on the official bond of a purser stationed at a navy-yard at which there is no navy agent are liable for the defaults of their principal in failing to disburse or account for moneys remitted to him as purser, notwithstanding some portion of the moneys remitted to him would have been remitted to the navy agent if some person holding that office had been stationed at that yard. (*Strong* v. *United States*, 6 Wall., 788.)
>
> By the terms of the bond in suit the sureties are to become responsible if their principal does not justly and faithfully account for and pay over to the United States all public moneys which may come into his hands or possession. Beyond doubt the amount went into his hands and possession as public moneys, and in the judgment of the court here, the ruling of the court below, that the sureties are liable for it, is correct. (*Soule* v. *United States*, 100 U. S., 8.)
>
> While it may be true that no law specifically imposed on the collector the duty of making dis-

bursements for any marine hospital or for the light-houses or revenue cutters, it is not true that such duties were "extra-official as to the office of collector" if the payments were ordered by the Secretary of the Treasury. (*Gaussen* v. *United States*, 97 U. S. 593.)

It is immaterial how the officer receives the public money; he must account for it. (*Jessup* v. *United States*, 106 U. S., 147.)

Having received the public moneys as paymaster he must account for them as paymaster. (*United States* v. *Bradley*, 10 Pet., 365.)

If two sums of the same amount, instead of one, are advanced to a disbursing agent by the mistake or laches of Government officers, the sureties are liable for his misapplication of any such funds. The sureties are liable for public funds coming into the hands of their principal as such officer, even though the funds come to his hands contrary to an act of Congress. (*United States* v. *Cutter*, 2 Curtis, 617.)

IV.

The Treasury transcripts were properly admitted in evidence.

The transcript (pp. 27–31) was offered to show the condition of his accounts as affected by the credits in 1886 and 1889 from the attachment proceedings. It is submitted that the appellants have no just ground of complaint to the admission of evidence which reduces the indebtedness of their principal; their objection is that it is immaterial. It is conceived, nevertheless, that if these credits had not been exhibited there would have been at least a claim of unfairness and wrongful concealment. The main objection, however, is to the transcript called the "consolidated settlement," certified under section 886

of the Revised Statutes of the United States by the Third Auditor of the Treasury as "a transcript from the books and proceedings of the Treasury Department, and that the papers annexed thereto are true copies of the originals on file and of the whole of said originals." It contains the certificate of Third Auditor, addressed to Second Comptroller, dated October 7, 1884, that he has "examined and adjusted the account of Henry W. Howgate, lieutenant, Twentieth Infantry, property and disbursing officer, Signal Service, U. S. A., for April, 1878, to September, 1880, inclusive," and finds the "balance due the United States $133,255.22, as appears from the statements and vouchers therewith transmitted for decision and certification;" and this balance the said Comptroller admits and certifies.

The act of Congress making Treasury transcripts evidence is found in the Revised Statutes of the United States:

> SEC. 886. When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the Department, or when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to or connected

with the settlement of any account between the United States and an individual, when certified by the Register or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court: *Provided*, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.

The appellants assert (brief, p. 34) that the certificates are not in proper form because "neither the word 'account' nor 'settlement' nor any equivalent term is used in the certificates, nor is the court informed by them that the transcripts relate in any manner to the accounts of Howgate as property and disbursing officer of the Signal Corps." These certificates follow the statute literally. The transcripts and the papers annexed thereto relate to or are connected with the settlement of his account. Among these papers are copies of one hundred and twelve "accounts current" covering the period of the bond, of "1st Lieutenant H. W. Howgate, P. & D. officer, U. S. Army, on account of the Signal Service, U. S. Army, at Washington, D. C.," in which the officer charges and credits himself for "moneys that have come into (his) hands on account of the Signal Service, U. S. Army."

These are his own personal acknowledgments of the receipt of each and all the various sums charged to him in the "consolidated settlement" and the "statement of differences" (showing the credits disallowed, consisting of fifty-nine items, in as many separate copies). These are precisely of the class of papers which the statute contemplates "may be annexed to the transcript and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers." It is further claimed that the transcripts, to be admissible under the statute, must show both sides of the entire account; that is exactly what these transcripts do show. They are not justly subject to any of the criticisms alleged by appellants; on the contrary, they are unusually full in their detail; the cases cited in the appellant's brief do not condemn such transcripts as these—they sustain them. All of the objections urged against these transcripts appear to have been answered by this Court. In *Bruce* v. *United States*, 17 How., 437, it was expressly held that the transcript was competent evidence of the receipt by the officer of the amounts charged to him, and the receipts need not be produced; in the case at bar more than was necessary was exhibited in the transcript.

In the language of the case upon which appellants appear mainly to rely:

> What the statute meant was that the official certificate of the officer charged with the examination of the accounts should be of such character as to give the court, as well as the parties, an assurance that the transcript offered as evidence to support the claim of the Government exhibits, in fact, the final adjust-

> ment of the accounts of the delinquent officer, as shown, not by mere copies of original papers on the files, but upon the books and records of the Department. * * * When the Government desires, in suits against a delinquent officer accountable for public money, to use the final adjustment of his accounts as evidence, the certificate of the officer should show, not necessarily in the very words of the statute, but plainly, and not by mere inference, that the transcript offered is from the books and proceedings of the Department; in other words, that such transcript presents the account of the delinquent as finally adjusted by the proper officers of the Government, and spread upon the records of the Department. (*United States* v. *Pinson*, 102 U. S., 554, 555.)

"The certificate has the legal effect of making the transcript *prima facie* evidence of the fact of indebtedness, which it certifies, unless upon the face of the account it necessarily appears otherwise." The objection that the receipt on the form expressed merely the aggregate amount of certain alphabetical lists was overruled. "But the receipts offered were signed by the collector, on their face constituted a part of his official transactions, and formed the very basis of the account against him upon the books of the Treasury Department. The originals would be competent against him, for they are not secondary evidence, although they may show the existence of other documents more in detail. The law gives to a copy certified by the Treasury Department at least the same force in evidence which the original would otherwise have." *United States* v. *Hunt*, 105 U. S., 183.)

> The objection that the reports were fragmentary and incomplete is not sustained by the facts. As

presented in the record each report is complete and perfect in itself. Each report contains all upon the subject during the time that it purports to represent. In the aggregate they cover the whole period of Barrett's service. The statute says that a transcript from the books shall be admitted as evidence. A transcript or transcribing is substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual and all of every account shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books. Nor is the objection that the reports charge Barrett with gross sums and with balances without giving details sustained by the facts. * * * The reports are made up with much particularity and give the items on each side of the account. It is not a case of a certificate of balances merely. We are not authorized, however, to regulate the manner in which the Departments shall keep their books or to prescribe the minuteness of the detail. The items in these reports are manifestly made up from statements and details of the daily business furnished by the collector. They are necessarily condensed when carried to a ledger account, and the results of many items or of some considerable period of time may be stated in a briefer form than they stood upon the original

> entries. The means of particular information are open to either party. We see no objection on this ground to the evidence now presented, and are of the opinion that there was no error in its exclusion. (*United States* v. *Gaussen*, 19 Wall., 212, 213.)

The accounting officers of the Treasury had jurisdiction to state the account embraced in the transcript.

The appellants' evidence (pp. 36–58) showed that Howgate's accounts had been stated and settled by the Treasury Department from time to time as he had rendered them, and that on December 18, 1880, his resignation was accepted and he left the service. The appellants insist that the "consolidated transcript" is a statement or settlement made after his accounts had been once stated and settled by the accounting officers of the Treasury; that these officers in auditing and settling such accounts act in a *quasi* judicial capacity, and they have no power or jurisdiction to restate or alter them in any way to the prejudice of the officers, except to correct clerical errors of computation and the like; that they are stated or settled accounts, and can only be changed by consent, or surcharged and falsified by proper pleadings and proofs between the parties thereto in a court of competent jurisdiction. The motion to exclude the transcript on the ground that there was no authority in law to reopen and restate the accounts, and that "no facts or circumstances had been shown in evidence requiring or justifying the restatement, etc.," was made at the close of the appellants' testimony (p. 66). The court properly overruled this motion.

The "facts and circumstances" to justify the reopening and restatement of the accounts offered by the appellants

were abundantly shown in the testimony in rebuttal, which exhibited the proof of the false, fraudulent, and forged vouchers (contained and enumerated in "the statement of differences") upon which the alleged settlements had been procured by Howgate. The grossest fraud and imposition was practiced by him in settling those accounts.

Fraud, says Judge Cooley (Torts, 474), "is deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."

Fraud, says this court, will vitiate the most solemn transactions, and any asserted title founded on it is utterly void. (*The Armistad*, 15 Pet., 518, 594.)

A conveyance on its face legal may be shown, even in an action of ejectment, to be void for fraud. Fraud is cognizable in a court of law as well as in a court of equity. (*Swayze* v. *Burke*, 12 Pet., 11.)

> If, to a bill for an account, the defendant plead, or, in his answer rely, upon a settled account, the plaintiff may surcharge, by alleging and proving omissions in the account, or may falsify, by showing errors in some of the items stated in it. The rule is the same in principle at law; a settled account is only prima facie evidence of its correctness. It may be impeached by proof of unfairness, or mistake in law, or in fact. (*Perkins* v. *Hart*, 11 Wheat., 237.)

The rule is universal, that if there has been any mistake, omission, fraud, accident, or undue advantage by which the account stated is vitiated and the balance incorrectly stated, it will not be conclusive between the parties, but it may be opened and reexamined. (1 Amer. and Eng. Ency. Law, 125.)

Treasury accounts are not exceptions to this rule. This court seems to have so declared.

In *United States* v. *Eckford* (1 How., 250), this court said:

> It is contended that the duties of the Treasury officers, charged with the settlement of these accounts, are in their nature judicial; and that when an account is once settled it is conclusive on the Government, and can only be opened for correction by a suit in court (260). * * * We think that the transcript or restatement of the account, as explained by the deposition, was competent evidence to the jury (262).

In *Soule* v. *United States* (100 U. S., 8):

> It is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered.

And in *United States* v. *Johnson* (124 U. S., 253, 254):

> We have said that the approval by the Secretary of the Treasury of an agent's account of expenses in the collection and sale of captured and abandoned property would not be conclusive if it appeared either that such approval was procured by fraud or that such expenses were incurred in violation of some positive statute, or in contravention of public policy. Much was said at the argument to the effect that the transactions of the defendant were based upon fraud; that he withheld or suppressed evidence that it was in his power to produce, and that what he did was calculated to debauch military officers to whom money was paid by him for the performance of services, in respect to which they were forbidden by law to accept compensation. It is only necessary to say that the findings of fact do not sustain these propositions.

> The record contains nothing to justify this court in holding that the defendant had been guilty of any fraud that would invalidate the settlement of his accounts with the Government.

In that case the referee found there was no error or fraud to justify the reopening of the settlement, and the court found there was no fraud.

The alleged settlements offered in evidence by the defendant were "subject to revision by the proper courts." (R. S., U. S., sec. 191.) They were in the case at bar subjected to that revision; shown to be based on fraudulent vouchers, and therefore successfully impeached.

V.

The judgment against Howgate was competent evidence against his surety.

In order to assail the integrity of the accounts offered by the appellants, which would seem to show that Howgate had kept the condition of his bond that he should "faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. A., without fraud or delay," the Government introduced in evidence the testimony of R. H. Rochester, treasurer of the Western Union Telegraph Company, and D. H. Bates, president of American Union Telegraph Company; by the former, Rochester, it proved (p. 83) that vouchers which Howgate had passed on the Treasury in the settlement of his accounts (pp. 93–94) for $12,100, $11,800, and $12,480, respectively, were forgeries; and by the latter, Bates, it proved (p. 91) that a similar voucher for $4,000

was false and fictitious. These items, among others, were included in the suit brought by the United States, by its special attorney, against Howgate, August 24, 1881, to recover $101,257.08; the Government in rebuttal (p. 67) offered in evidence the record and proceedings in that case (No. 23081 Law, Supreme Court, D. C.) and the minutes of the entry of a personal judgment for that amount in the case (p. 70) for the purpose of showing that the items contained in the disallowed credits in the statement of differences in the transcript were the same items as those in said law case, and that judgment was obtained against Howgate upon these disallowed items, and for the further purpose of showing that the alleged settlements of accounts introduced by Moses were based upon false and fraudulent vouchers. This was clearly competent evidence against Howgate's sureties.

Appellants in their brief (pp. 40, 41) assign two reasons against the competency: (1) That they having proved a stated account, no evidence to impeach it was admissible without a pleading setting forth in what particulars, etc., the stated account was false; that the plaintiff should have replied to the plea of conditions performed specific facts impeaching that account; but there was no plea of settled or stated account interposed, and no such reply as is suggested would have been responsive to the plea of conditions performed; and (2) that the judgment was not evidence, because Moses was not a party to it and had no notice of it.

It is well-settled law that a judgment against the principal is at least *prima facie* evidence against the surety; as the surety may claim the benefit of a judgment in favor

of his principal, so he may reasonably be concluded by a judgment against him, unless he can show facts which exonerate him.

Murfree on Bonds, 598 et seq.
McLaughlin v. *Bank* (7 How., 229).
Drummond v. *Prestman* (12 Wheat., 515).
Bergen v. *Williams* (4 McLean, 125).

There are many authorities holding that the judgment is conclusive against the surety.

In concluding the discussion of this topic, in appellants' brief (p. 45) it is claimed that the act of settlement and notice to Moses that Howgate was not indebted to the Government and leaving him under this impression until it was too late to protect himself is such active misconduct as ought to discharge a surety. But neither delay, default, nor the equitable doctrine of estoppel can be set up against the Government. It is only estopped by deed.

United States v. *Van Zandt* (11 Wheat., 184).
Dox v. *Postmaster-General* (1 Pet., 318).
Hart v. *United States* (95 U. S., 318).
United States v. *Sherman* (98 U. S., 565).
Steele v. *United States* (113 U. S., 134).
Simmons v. *Ogle* (105 *United States* 273).
German Bank v. *United States* (148 U. S., 579).

The theory of the liability of the parties to this bond is set forth in the instruction granted at the instance of the plaintiff (p. 106), which was as follows:

> According to the tenor of the bond offered in evidence by the plaintiff, it was the duty of Lieutenant Howgate, property and disbursing officer, Signal

Service, U. S. A., to faithfully expend and honestly account for all public money which should come into his hands on account of the Signal Service, U. S. A., without fraud or delay; and the jury are instructed that in the absence of evidence to the contrary, the Treasury transcripts, including the difference sheet (U. S., Nos. 8 and 9), offered in evidence by the plaintiff must be considered as exhibiting all the receipts as well as all the credits allowed or claimed by Lieutenant Howgate, property and disbursing officer, Signal Service, U. S. A.; and that the balances certified by the Comptroller of the Treasury and the Third Auditor (copies of which were offered in evidence by the defendants) could only have arisen from statements and settlements of the accounts of said officer founded upon the items contained in said transcripts and difference sheet; and if the jury believe from the evidence that such statements and settlements of his accounts included the allowance of credits based upon and evidenced by false, fictitious, fraudulent, or forged vouchers and receipts, then they are instructed that such statements and settlements of his accounts were not binding upon the United States; and the United States had the right to restate the said accounts of said officer; and if the jury believe from the evidence that the bond in evidence was executed by the defendant's intestate, and that the balance due by Howgate at the time of this action equaled or exceeded the amount of the penalty of the bond, the plaintiff is entitled to the verdict of the jury against the defendants, administrators of William B. Moses, one of the sureties on the aforesaid bond, for $12,000, the penalty of said bond, with interest thereon from the 29th day of September, 1884, when the writ in this action was served on said Moses.

This instruction, together with the court's charge, covered the law of the whole case. The charge (p. 111) was:

> Gentlemen of the jury, although this case has taken a good deal of time in order to get the evidence before you and to enable the defendants to avail themselves of their lawful rights in the trial of the cause, yet the only two questions that remain for your consideration are these:
>
> In the first place, did William B. Moses execute this bond which has been offered in evidence; and in the next place, was Captain Howgate indebted to the United States, at the time this action was brought, in the sum of $12,000 or more. Those two questions are submitted to you upon the evidence.
>
> To maintain the action the Government offered in evidence a transcript or a statement of the account of Captain Howgate, a disbursing and property officer of the Signal Service, showing balances against him due to the United States to the amount of upward of $100,000.
>
> The defendants thereupon offered in evidence transcripts from the books of the Treasury Department showing settlements with Captain Howgate for several successive years, indicating that there was no balance due by him to the United States.
>
> As against this evidence of settlement with Howgate, indicating no indebtedness to the United States, the Government then offered in evidence, in the first place, a judgment recovered against Captain Howgate since the statement of these settlements offered by the defendants in evidence, by which the Government recovered against him a judgment for the sum of $101,000 and over, and then offered evidence tending to show that the items making up this aggregate amount of $100,000 in round numbers were identical, to a large extent, with the items that make up the

amount claimed against his surety upon the bond in suit in this action, for the purpose of showing that, notwithstanding these settlements that had been made with Captain Howgate, there was an indebtedness on his part to the United States upon that account.

It appears that Captain Howgate was represented by counsel in that action, and that the judgment rendered against him is a personal judgment. In addition to that the United States has offered in evidence the deposition of two witnesses, tending to show that the vouchers for which Captain Howgate had received credit in these settlements with the United States, aggregating $40,000 or $50,000, if I recollect aright, were false, fictitious, fraudulent, and forged. The Government also offered evidence tending to prove that upon the discovery of these fraudulent vouchers, at the instance of the Signal Office, the Treasury Department restated the account and offered this large transcript which has been described here as the bulky document.

The sole purpose of that was to indicate to you that these settlements made with Captain Howgate were not conclusive or binding upon the United States because they were tainted with fraud.

If upon the whole evidence you believe that this bond was executed by William B. Moses, and at the time of this action Captain Howgate was indebted to the United States as disbursing and property officer of the Signal Service in the sum of $12,000 and upward, and whether more than $12,000 matters not, inasmuch as the Government can only recover upon this bond a verdict and judgment for the amount of the penalty of the bond, which is $12,000, then the Government would be entitled to recover a verdict for the amount of this bond, with interest from the day when the writ was served.

This same bond was put in suit in the district court of the United States for the southern district of New York, against the other surety, Rogers. Judge Wallace held (32 Fed. Rep., 890) that the bond was a voluntary one; that, although it should be assumed that Howgate was not an officer and did not hold an office while the bond was in force, still the bond must be treated as a contract to secure the United States against loss from the unfaithfulness of an employee in the Signal Service, who was about to be intrusted with public money in the course of his employment; and that the defendant was liable on the bond. On appeal to this court the judgment below was affirmed. (*Rogers* v. *United States*, 141 U. S., 548.)

The decision of the court of appeals (p. 113) affirming the trial court, presents a lucid and able discussion of the points involved so far as, in its opinion, they are material; in that decision the case is fairly, fully, and properly disposed of. It is respectfully submitted there was no error, and the judgment of the court of appeals should be here affirmed.

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